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THE
ONTARIO LAW REPORTS.

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1903.

REPORTED UNDER THE AUTHORITY OF THE
LAW SOCIETY OF UPPER CANADA.

VOL. V.

EDITOR:
JAMES F. SMITH, K.C.

REPORTERS:

G. F. HARMAN,	}	BARRISTERS-AT-LAW.
T. T. ROLPH,		
A. H. F. LEFROY,		
G. A. BOOMER,		
E. B. BROWN,		
R. S. CASSELS,		

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JUDGES
OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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OF THE
HIGH COURT OF JUSTICE
DURING THE PERIOD OF THESE REPORTS.

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MEMORANDUM.

On the 24th April, 1903, the HONOURABLE WILLIAM LOUNT, a Justice of the Common Pleas Division, died at his residence, Toronto.

On the 16th May, 1903, JAMES VERNALL TEETZEL, one of His Majesty's Counsel, was appointed one of the Justices of the Common Pleas Division.

ERRATA AND ADDENDA.

- Page 73, head lines—For “argument” read “agreement.”
81, head note, 3rd line from end—For “of” read “as.”
176, line 11—For “Thomas” read “Thompson.”
176, line 11—For “2 Dr. & W.” read “4 Dr. & Warr.”
198, last line of head-note—For “as” read “of.”
198—For “ch. 9” read ch. 29, also on page 201.
413, line 7 from top—For “390” read “290.”
428, head lines for “ch. 135” read “ch. 166,” and same on p. 429.
509, head note, 4th line—For “1 Edw. VII., ch. 19” read “ch. 12.”
544, head note, 4th line—For “mutual” read “neutral.”
552, line 12 from top—For “Parker” read “Packer,” last line for
“193” read “139.”
579, head note, 1st line—After R.S.O. insert “1897 ch.”
607, head note, 3rd line—For “where” read “was.”
621, head note, last line—For “for” read “of.”
638, line 11 of head note—For “Steele v. Zimmerman” read
“Zimmerman v. Steele.”

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REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

BIRNEY

V.

THE TORONTO MILK CO., LTD.

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Nov. 15.

Company—Appointment of Manager—Provisional Directors—Absence of By-law and Seal—Payment for Services Rendered—R.S.O. 1897, ch. 191, secs. 47 and 48.

Plaintiff was appointed by the board of provisional directors of a company incorporated under the Ontario Joint Stock Companies Act to be a director and was at the same time appointed manager at a salary. In an action for the salary or compensation in which it appeared that the services rendered had not resulted in any benefit to the company which had never gone into operation :—

Held, that as plaintiff had not been appointed manager or his payment provided for by by-law approved of by the shareholders, and as there was no contract under the corporate seal he could not recover.

In re The Ontario Express and Transportation Co. (1894), 25 O.R. 587, commented on.

Judgment of Lount, J., reversed.

THIS was an appeal from the judgment of Lount, J., at the trial.

The following facts are taken from the judgment of STREET, J., in the Divisional Court :—

The defendants were incorporated on the 17th May, 1901, by letters patent under the Ontario Companies Act, for the purpose of buying, selling and dealing in milk and its products the capital stock of the company was fixed at \$125,000, and six provisional directors were named in the letters patent.

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On 25th May, 1901, a meeting of the provisional directors was held at which by-laws were adopted, one of which provided that the affairs of the company should be managed by a board of "not less than three nor more than nine directors."

On the same day a general meeting of the shareholders was held at which all were present or were represented by proxy. At this meeting the above by-law was adopted, but no directors seem to have been elected.

No minute book of this or any other meetings of directors or shareholders was kept; the record of the minutes of the shareholders' meeting is imperfect.

A sheet of paper was produced purporting to contain minutes of a meeting of directors held at Mr. O'Brian's office on 29th June, 1901, at which three of the provisional directors were present.

The first resolution at that meeting was that the plaintiff in the present action should be appointed a director: the second resolution was that he should be appointed manager of the company for the ensuing year, with a salary as follows:—

First nine weeks at	-	-	\$25 per week
Second nine weeks at	-	-	\$30 "
Remaining weeks at	-	-	\$40 "

making the year's salary \$1,855: subject to dismissal at the termination of any one of the above mentioned periods, with one week's salary at the discretion of the board of directors.

The plaintiff was made aware of his appointment as a director and also of his appointment as manager. He afterwards attended a meeting as a director of the company.

No president was ever appointed to the company, and it never went into operation.

The plaintiff says that, acting under his appointment as manager of the company, he endeavoured to get certain persons to go on the board and to put up money to enable the company to go into operation. He failed in doing so, and as a result the company never went into operation.

The present action was brought to recover \$495, being salary as manager for the first eighteen weeks.

The defendants denied any contract binding upon them.

The action was tried at Toronto on 7th April, 1902, and judgment was given for the plaintiff for \$495 and costs.

J. M. Godfrey, for the plaintiff.

J. B. O'Brian, for the defendants.

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From this judgment the defendants appealed to a Divisional Court, and the appeal was argued on the 11th September, 1902, before STREET and BRITTON, JJ.

J. B. O'Brian, for the appeal. The meeting at which the plaintiff alleges he was appointed was not a regular meeting of directors, but a mere informal gathering at which only three directors were present, and no minutes were kept; and the other three directors were not aware of the meeting or what was done. The evidence shews the plaintiff was not to get any salary unless the company became a going concern. Even if he proved a yearly hiring, he must prove a *quantum meruit*. In any event, he was not appointed by by-law. The shareholders did not approve of his appointment, and he had no contract under seal. The cases are collected in Pollock on Contracts, 7th ed., pp. 147-153, shewing where the old rule may be departed from. He must prove a *quantum meruit*: *Lamburn v. Cruden* (1841), 2 M. & G. 253; *Sumpter v. Hedges*, [1898] 1 Q.B. 673, at p. 676. The act of the three directors at an informal gathering cannot bind the company: *The Hamilton and Port Dover R.W. Co. v. The Gore Bank* (1873), 20 Gr. 190; *D'Arcy v. The Tamar, etc., R.W. Co.* (1867), L.R. 2 Ex. 158; *The People's Bank v. St. Anthony's Roman Catholic Church* (1888), 109 N.Y. App. 512; *Hunt v. The Wimbledon Local Board* (1878), 4 C. P. Div. 48, at pp. 53, 54, 56 and 57; *Lawford v. Billericay Rural District Council* (1902), 18 Times L.R. 507; *Hughes v. The Canada Permanent Loan and Savings Society* (1876), 39 U.C.R. 221.

J. M. Godfrey, contra. There is no evidence that the meeting was at all irregular, or that the plaintiff knew it. The presumption is it was regular; and the onus is on the defendants to shew it was irregular: *Mahony v. The Liquidator of the East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, at p.

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894. He performed services, and was entitled to leave when he did. This was an executed contract, and no seal was necessary: *The Wardens, etc., of the Mystery of the City of London Fishmongers Co. v. Robertson* (1843), 5 M. & G. 131, at p. 193; *Thompson v. The Brantford Electric and Operating Co., Ltd.* (1898), 25 A.R. 340, *per* Burton, C.J.O., at p. 345, *per* Osler, J.A., at p. 348; R.S.O. 1897, ch. 191, sec. 81; Masten's Company Law, pp. 245, 246; *Forrest v. Great North-West Central R. W. Co.* (1899), 12 Man. R. 472; *Ellis v. The Midland R. W. Co.* (1882), 7 A. R. 464; *The Albert Cheese Co. v. Leeming* (1880), 31 C.P. 272; *McPherson v. Trustees S.S. No. 7, Usborne* (1901), 1 O.L.R. 261. [STREET, J.:—But in such cases as those the company got some benefit; here the services of the plaintiff did not result in any benefit to the company.] The company would have received a benefit if it had not been abandoned. The by-law referred to in sec. 48 of R.S.O. 1897, ch. 191, is one for the payment to a president or director in his capacity as president or director.

O'Brian, in reply.

November 15. STREET, J.:—The nominal capital of the defendants' company was fixed by the letters patent at \$125,000, divided into 125,000 shares of \$1 each, of which it is stated by the plaintiff that he subscribed for 12,000 shares, and each of the other six corporators for 200 shares.

No money seems to have been paid in by any one, but the plaintiff says that his \$12,000 has been paid in full by commissions upon his efforts to induce a number of established milkmen to sell out their businesses to the company, and that his salary as manager has been earned by his efforts to induce certain of these milkmen to go upon the board, and to advance the money necessary to enable the company to begin the business for which it was incorporated.

None of these efforts of the plaintiff have been successful, nor has the company reaped any advantage from them, for it has never been able to go into operation.

If the plaintiff's view of his position is correct, however, the result will be that the other corporators will be liable to pay

him \$495 for what he has done, because his shares he says are fully paid up by his work and theirs are not paid up.

It is further to be remarked that his interest in the success of the company was ten times that of all the other corporators put together, and that the only work which he says he did as manager after his appointment seems to have been merely a continuation of the work which he says he was doing before his appointment.

I am of opinion that the plaintiff is not entitled to recover upon a contract with the company, because no by-law for his appointment as manager of the company was passed, and no contract was made with him under the seal of the company.

The Ontario Companies Act, ch. 191, R.S.O. 1897, sec. 47, clearly contemplates that such appointments should be made by by-law; and, apart altogether from the statute, it is clear that whatever latitude may be allowed to trading corporations in the manner of appointment of mere servants, or in the case of casual or temporary hirings, appointments of an important character such as that of the manager of the company, in order to be binding, must be under seal.

Such was the holding of the late Mr. Justice Rose in *Re The Ontario Express and Transportation Company* (1894), 25 O.R. 587, and it is in accordance with numerous preceding authorities: *Dunston v. The Imperial Gas Light and Coke Co.* (1832), 3 B. & Ad. 125, and especially judgment of Parke, J., at p. 132; *Church v. The Imperial Gas Light and Coke Co.* (1838), 6 Ad. & El. 846, at p. 861; *Young v. Leamington* (1883), 8 App. Cas. 517; Lindley on Company Law, 6th ed., p. 269 *et seq.*

I think the plaintiff is further prevented from recovering by the effect of the provisions of sec. 48 of ch. 191 R.S.O., which are as follows: "No by-law for the payment of the president or any director shall be *valid or acted upon* until the same has been confirmed at a general meeting."

There is in the first place the underlying assumption from the terms of this section that a by-law of the directors in the first place is necessary before payments can be made to them or to the president: and this is coupled with the express provision that such a by-law when passed is of no validity

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until it has been confirmed at a general meeting of shareholders.

It has been argued before us by the plaintiff that this section is only intended to apply to payments to the president for performing the duties of president, and to directors for performing their duties as directors, and Mr. Justice Rose in his judgment in *Re The Ontario Express and Transportation Co.*, 25 O.R. 587, appears to have expressed an opinion to that effect. The opinion so expressed, however, does not seem to have been anything beyond an *obiter dictum*, and is not technically a part of his judgment in the case, and is therefore not binding upon me.

In my opinion we should hold the section as requiring the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves whether under the guise of fees for their attendance at board meetings or for the performance of any other services for the company.

It is not conceivable that the Legislature intended to forbid the directors from voting small sums to themselves for their attendance at board meetings, without obtaining the consent of the shareholders, and at the same time, to allow them to vote large sums to themselves for doing other work, without reference at all to the shareholders. The interpretation contended for by the plaintiff would in fact render the section nugatory, for nothing would be easier than to evade it.

I think the section should be given a broad and wholesome interpretation, and that it should be held wide enough to prevent a president and board of directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting of the shareholders.

The views I have expressed are such as to prevent the plaintiff from having a right to recover for the value of his work done for the company.

For these reasons, the appeal should, in my judgment, be allowed with costs, and the action should be dismissed with costs.

BRITTON, J.:—I agree that in this case the appeal should be allowed and the action dismissed.

There is no properly authorized contract under the seal of the corporation, and this is not a case in which the plaintiff can succeed upon an executed consideration. I come to this conclusion apart altogether from the effect in this case of sec. 48, ch. 191 R.S.O. 1897, upon plaintiff's rights.

The company never really went into operation; there was no payment in money by any subscriber for shares for any portion of the stock. The plaintiff was promoter, and as such, no doubt, did a good deal of preparatory work in getting ready for the business the company was authorized to do. For this the plaintiff received "paid-up" shares.

At a meeting of directors, assuming that the meeting was properly called, the plaintiff was appointed a director, and then it was resolved that the plaintiff be manager for the ensuing year. This, in my opinion, only means that if the company went into operation, the plaintiff would be their manager, "to buy, sell, and deal in milk and the products of milk and such other articles of domestic consumption as may be conveniently dealt in in conjunction therewith."

That is what the company was authorized by their charter to do. The plaintiff, as promoter, was endeavouring to enable this company to become a "going concern." This is all that the plaintiff did, and for this he received the paid-up stock.

The company never was in a position to require the services of a manager, and the plaintiff knew this. It was not the fault of the plaintiff, but upon the evidence I cannot resist the conclusion that until this company was ready to buy, sell and deal in milk, etc., there was to be no actual hiring of the plaintiff.

Up to that point the plaintiff's original relation to the company continued, and while it may be unfortunate that he has lost so much of time and effort in his endeavour to organize a company and get it ready for work with the intention of, for a time at least, being its manager, I do not think he can recover.

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[DIVISIONAL COURT]

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Nov. 10.

Dec. 3.

STANDARD TRADING CO. v. SEYBOLD ET AL.

Costs—Security for—Præcipe Order—Increase in Amount—Rule 1208—Discretion.

Under Rule 1208, the fact of the defendant having obtained a præcipe order for security for costs by which a definite amount of security is provided for, will not prevent him from maintaining an application for additional security when it becomes apparent that the costs to be incurred will be greatly in excess of the amount provided for, and there is no element of vexation on the part of the applicant.

Bell v. Landon (1881), 9 P.R. 100, distinguished.

Where the defendants had before the trial incurred large costs by reason of examinations for discovery, interlocutory motions and appeals, and a commission to take evidence abroad, the original security, \$200 paid into Court in compliance with a præcipe order, was ordered by a Judge (on appeal from a Master's order refusing an increase) to be increased by a bond for \$600 or payment into Court of an additional sum of \$300; and the order was affirmed by a Divisional Court as a reasonable exercise of discretion.

Decision of MACMAHON, J., affirmed.

AN appeal by the defendants Seybold and Booth from an order of the local Master at Ottawa dismissing their application for an order requiring the plaintiffs to increase the security for costs furnished by them under an order obtained by defendants upon præcipe.

The appeal was heard by MACMAHON, J., in Chambers, at Ottawa, on the 1st November, 1902.

C. J. R. Bethune, for the appellants.

G. E. Kidd, for the plaintiffs.

November 10. MACMAHON, J.:—The plaintiffs are a trading company carrying on business in the State of New York, and a præcipe order was obtained by the defendants for security for costs under Rule 1199, and, instead of giving a bond for \$400, the plaintiffs paid into Court \$200, under Rule 1207.

After the costs had been largely increased by reason of examinations for discovery and by a large number of interlocutory applications by the defendants, one of which ended in an appeal to the Divisional Court, and also by the attendance at large expense of counsel for the defendants on the 24th and

25th April last at the city of New York to take part in the examination of witnesses under a commission issued on behalf of the plaintiffs to take the evidence of certain witnesses of the plaintiff company in that city, whose attendance the plaintiffs failed to procure, the defendants applied to the local Master at Ottawa for an order increasing the security for costs to be given by the plaintiffs. The learned local Master gave a considered judgment in which he states: "There is little doubt that the defendants' taxable costs will by the time the case is tried amount to at least \$500, but the defendants having elected to take a *præcipe* order for security, they are bound by the election, unless the case unexpectedly develops into one of great magnitude, or, unless the plaintiffs are seeking an indulgence, or are in such a position from their own conduct, as to compel them to submit to terms in order to recover what they have lost." He also said: "The defendants say that, had they applied in the beginning for increased security, instead of relying on the provisions of Rule 1199, they could not at that time have succeeded in shewing that the sum of \$200 would not be adequate security. In this they are perfectly right, but leave might, and probably would, have been reserved to them to move again later on, and at the worst they would not now have been in the position of having elected to rely on Rule 1199."

The order was refused, as the learned Master considered that, notwithstanding the change in the Rule regarding security for costs, he was still bound by the decisions in *Trevelyan v. Myers* (1895), 15 C.L.T. Occ. N. 135, and *D'Ivry v. World Newspaper Co.* (1897), 17 C.L.T. Occ. N. 82.

The Rule in force when the above cases were decided was Rule 1250 of the Consolidated Rules of 1888, and was as follows: "The amount of security may be increased or diminished from time to time by the Court or a Judge." And it was held in the above cases that the defendants should have foreseen that the costs would be considerably increased, and instead of taking the ordinary *præcipe* order for security should have made a special application for security in a larger sum. Not having done so, the defendants were bound by their election. And the Court in *D'Ivry v. World Newspaper Co.*

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said it could not perceive that the above Rule made any difference in the practice, as the Court had always *power* to increase or diminish the security in a proper case.

The present Rule, 1208, is as follows:—

“The amount of security, whether directed to be given by an order issued on *præcipe* or otherwise, may be increased or diminished from time to time by the Court or a Judge.”

By its terms the fact of the defendants having obtained a *præcipe* order by which a definite amount of security was provided for, bound them to no greater extent than if they had in the first instance made a special application for security. In either case the defendants must shew facts disclosing a proper case for increased security.

Had the plaintiffs given a bond under the order as taken out, the defendants would have had security to the amount of \$400 for their costs. But the plaintiffs, instead of giving a bond, paid into Court under Rule 1207 the sum of \$200, being one-half the penalty of the bond required.

The learned Master having stated that the defendants' costs will probably amount to \$500, and that the increase is largely due to the plaintiffs' interlocutory motions and appeals, the simple question is: Have the defendants made out a case for increased security? I think they have. The estimated costs of defendants amount to two and a half times the sum for which security has been given. And, although the defendants might have foreseen that a commission to take the evidence of witnesses in New York would issue and that an examination for discovery would possibly be necessary, they could not have anticipated at the time the order for security was obtained that an appeal would be made to a Judge in Chambers and then to a Divisional Court, the costs in connection with which would amount to one-half the sum deposited in Court as security.

The Rule since the passing of the Judicature Act in England is O. LV., r. 2, which states that “in any cause or matter in which security for costs is required, the security shall be of such amount and given at such time or times and in such manner or form as the Court or a Judge shall direct.”

In the case of *Republic of Costa Rica v. Erlanger* (1876), 3 Ch. D. 62, the sum of £100 security for costs had been given

before the Judicature Act came into operation. A large amount of costs had been incurred before the suit was heard, and further security to the amount of £500 to cover future costs was, under the above Order, ordered to be given. Mellish, L.J., in his judgment at p. 69, said: "There seems to have been a practice in Equity of limiting the amount, but that practice has been altered during this litigation. The order is that when there is a case in which security for costs should be given, the Court is to order it to be given for such an amount and at such time or times as may be just—thus making a technical security a real security; and I see no reason why the rule should not apply to this case." And James, L.J., said (p. 68): "It is impossible for a plaintiff, having given security for costs to the amount of £100, to say: 'I have a vested right to go on and incur any expense, and to amend my bill, and make a new case entirely. My £100 gives me a vested right to go on and laugh at any order which the Court of Chancery might make for payment of costs if I should fail.' That being so, I think that the Court has power to order other security if required. It seems to me that the defendants are entitled to have a reasonable amount."

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And in *Massey v. Allen* (1879), 12 Ch. D. 807, Hall, V.-C., said (p. 811) that the order made in *Republic of Costa Rica v. Erlanger* was not at variance with the practice which exists in the Common Law Divisions. See also the remarks of Lord Esher, M.R., in *Bentsen v. Taylor, Sons, & Co.*, [1893] 2 Q.B. 193.

Both the English Rule and our own contemplate that there may be more than one application for increased security. For the English Rule provides that the security "shall be in such amount and given at such time or times and in such manner as the Court may direct." And under our Rule it "may be increased from time to time by the Court or a Judge." No reservation is necessary in any order for leave to apply again, as the learned Master seemed to think.

The great increase in the costs from the causes to which I have referred, could not have been foreseen by the defendants when the præcipe order for security was obtained, and the order of the learned Master must therefore be reversed, and the

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plaintiffs ordered to give the defendants additional security by bond in \$600, or by payment into Court of \$300.

The costs of the appeal and of the motion before the Master will be to the defendants in any event.

From this decision the plaintiffs appealed to a Divisional Court, and the appeal was heard on the 3rd December, 1902, by BOYD, C., and MEREDITH, J.

J. H. Moss, for the appellants, contended that the defendants should shew that they were not bound by their election to take the ordinary præcipe order: that the costs had been increased in this case by a commission to take evidence in New York, examination for discovery, and some costs of interlocutory motions, all of which should have been foreseen. He referred to *Bell v. Landon* (1881), 9 P.R. 100; *Trevelyan v. Myers*, 15 C.L.T. Occ. N. 135; *D'Ivry v. World Newspaper Co.*, 33 C.L.J. 232, 17 C.L.T. Occ. N. 82.

D. L. McCarthy, for the defendants, was not called on.

BOYD, C.:—I do not think we can interfere. The Master thought he was bound by the decisions, but I do not think so, as the new Rule, 1208, was passed later, and was intended to effect a change.

Under the new Rule, 1208, I think an application for additional security is maintainable when it becomes apparent that the costs to be incurred will be greatly in excess of the usual amount provided for, and that there is no element of vexation on the part of the applicant. The former decisions proceeded upon *Bell v. Landon*, 9 P.R. 100, which was rather overstrained in its scope, for there the trial was half through, and to grant the application would have frustrated its completion.

My brother MacMahon has exercised a discretion, and we will not interfere with it. The appeal should be dismissed.

MEREDITH, J.:—The Rule is quite broad enough to support the order. Security already given, whether under a præcipe order or otherwise, may be increased or diminished from time to time. The discretion thus given is not limited to any particular

case or circumstances. It must, of course, be exercised with care, care, for instance, that the Rule is not invoked really for the purpose of defeating or delaying a fair and speedy trial and determination of the issues, or of merely harassing an absent plaintiff. The circumstances under which the order for security was obtained may well be taken into consideration; more applications than necessary are to be discouraged; but an application made in good faith is not to be refused merely because the defendants chose to take a *præcipe* order, instead of making a special application. It was not the practice, before the amendment of the Rule, to refuse to increase the security on that ground alone, even though the applicant might have foreknown that an application for such increase might become necessary. The Referee's order in *D'Ivry v. World Newspaper Co.*, briefly noted in 33 C. L. J. 232 and 17 C. L. T. Occ. N. 82, was not, at Chambers at all events, upheld on such narrow ground: in all the circumstances of that case the officer's discretion refusing an increase was not interfered with; and in *Bell v. Landon*, 9 P. R. 100, and *Trevelyan v. Myers*, briefly noted in 15 C. L. T. Occ. N. 135, there were also other material circumstances upon which the learned Judge acted in declining to interfere with a like discretion exercised by the Master in Chambers: see *Martano v. Mann* (1880), 14 Ch. D. 419; *Lydney, etc., Co. v. Bird* (1883), 23 Ch. D. 358; *Paxton v. Bell*, W. N. 1876, p. 249; *Sturla v. Freccia*, W. N. 1877, p. 188, W. N. 1878, p. 161. Had there been any such practice, as probably the framers of the amended Rule thought, the added words "whether directed to be given by an order issued on *præcipe* or otherwise" would have put an end to it. They quite meet the argument based upon an election to take a *præcipe* order urged in the cases in this Court above referred to. Increasing or diminishing security already given is a matter for the exercise of a judicial discretion, having regard to all the circumstances of each case, always remembering that the doors of the Court are open to all classes of litigants fairly seeking relief therein, and that no obstacle should unnecessarily be put in the way of an honest and reasonable litigant. That discretion has been exercised, after a careful consideration of all the circumstances of this case, and no sufficient ground has

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been shewn for interfering with it. "An appeal against an order for security for costs made at Chambers would I should imagine only succeed under very exceptional circumstances:" *per* Lord Esher, M.R., in *Bentsen v. Taylor, Sons, & Co.*, [1893] 2 Q.B. 193, at p. 194. "This is so much a matter of discretion that I should be slow to interfere with the order of the Judge of first instance if I did not entirely agree with him:" *per* James, L.J. in *Western, etc., Co. v. Walker* (1875), L. R. 10 Ch. 628, at p. 629.

But the costs ought not to have been given to the defendants, the motion was one for their benefit, the plaintiffs were not in any default, at the best for the plaintiffs the costs should have been made costs in the action; and, when a second order might be avoided by the exercise of reasonable forethought, the defendants getting it might well be made to bear the costs. Under all the circumstances, the costs throughout should be costs in the action. This question does not seem to have been discussed at Chambers.

Appeal dismissed. Costs in the cause.

T. T. R.

[DIVISIONAL COURT.]

MONRO V. TORONTO R.W. CO.

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Dec. 12.

Practice—Stay of Reference pending Appeal—Rules 826, 827, 829—Ruling of Master in Ordinary—Appeal from—Forum.

A judgment directed the Master in Ordinary to make partition of lands; ordered that the parties should execute and deliver all necessary conveyances, to be settled by the Master, and should give possession to each other in accordance therewith; and directed the Master to ascertain the plaintiff's damages for ouster, mesne profits, and waste. The defendants appealed from the judgment to the Court of Appeal, and gave the security provided for by Rule 826:—

Held, that the reference was stayed pending the appeal.

Construction and application of Rules 827 and 829.

The ruling of the Master that the reference was not stayed was a ruling upon a question of practice, and therefore came within the exception in sec. 75 (2) of the Judicature Act, R.S.O. 1897, ch. 51; and an appeal from his ruling lay to a Judge in Court.

APPEAL by the defendants from an order of Street, J., in Court, dismissing an appeal by the defendants from a certificate of the Master in Ordinary, upon the ground that such an appeal does not lie to a Judge in Court, but to a Divisional Court; and also an alternative appeal by the defendants from the certificate in the event of its being held that the appeal is to a Divisional Court.

The certificate of the Master was to the effect that he had ruled that the reference in this action directed by the judgment of a Divisional Court (4 O.L.R. 36) should proceed, notwithstanding a pending appeal to the Court of Appeal from that judgment, upon which appeal security had been given.

The appeals were heard by a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J., on the 10th November, 1902.

J. Bicknell, K.C., for the appellants, contended that the Master's ruling was upon a question of practice, within the meaning of sec. 75 of the Judicature Act, R.S.O. 1897, ch. 51, and therefore an appeal therefrom lay to a Judge; and that by the effect of Rules 827 and 829 there was a stay of the reference directed by the judgment, upon security being given on appeal.

W. N. Ferguson, for the plaintiff, contra.

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December 12. The judgment of the Court was delivered by MEREDITH, C.J.:—By the judgment of a Divisional Court it was declared that the respondent is entitled to a partition of the lands in question between him and the appellant company, for the residue of the latter's term under the lease in the pleadings mentioned; and it was referred to the Master in Ordinary to make partition accordingly; and it was ordered and adjudged that the respondent and the appellant company should forthwith thereafter execute and deliver all necessary conveyances, to be settled by the Master in Ordinary, for effectually vesting the shares and interests, as declared by the judgment, in the lands, in the parties to the action, according to their respective interests therein, and should give possession to each other in accordance therewith; and it was further ordered and adjudged that it should be referred to the Master in Ordinary to ascertain and fix the amount of damages (if any) to which the respondent was entitled in respect of the ouster, mesne profits, and waste claimed by the respondent in the statement of claim; and further directions and the question of subsequent costs were reserved until after the Master should have made his report.

From this judgment the appellant company appealed to the Court of Appeal, and, having given the security provided for by Con. Rule 826, applied to the Master in Ordinary to rule that the effect of this was, according to the provisions of Con. Rule 827, to stay further proceedings in the action, including the reference before him, pending the appeal.

The learned Master in Ordinary declined to rule as he was asked to do, and held that a stay had not been brought about by what had been done.

From this ruling the appellant company appealed, and the appeal came on to be heard before my brother Street in the Weekly Court. My learned brother, being of opinion that the appeal should have been to a Divisional Court, determined that he had no jurisdiction to hear the appeal, and he accordingly dismissed it.

From this decision the appellant company now appeals to the Divisional Court, and moves also by way of appeal from the ruling of the Master in Ordinary.

We are of opinion that the appeal from the ruling of the Master in Ordinary was properly brought before a Judge in the Weekly Court. The question raised being one of practice, the provisions of the statutes requiring appeals from the Master in Ordinary to be taken to a Divisional Court, R.S.O. 1897, ch. 51, sec. 75 (2),* do not apply. This exception as to matters of practice does not appear to have been brought to the attention of my learned brother. Had it been, we do not doubt that he would have concurred in this view.

Then as to the main question involved in the appeal. Upon the last revision and consolidation of the Rules very important changes were made in the practice as to the giving of security on appeals to the Court of Appeal and the staying of proceedings pending an appeal to that Court.

Before this revision and consolidation, the practice as to the giving of security by an appellant on an appeal from the High Court to the Court of Appeal and the staying of proceedings pending the appeal was regulated by sec. 71 of the Judicature Act and the then Con. Rule 804.

These provisions have been repealed, and by the present Rules the practice as to these matters is regulated by Con. Rules 826 to 830, inclusive.

By the new Rules, instead of the provision that upon the perfecting of the security mentioned in sec. 71 of the Judicature Act "execution" should be stayed in the original cause except in certain named cases, it is provided that unless otherwise ordered by the Court appealed to or a Judge thereof, "the execution of the judgment or order appealed from" shall, in the case of an appeal to the Court of Appeal, upon the security in Rule 826 (substantially the same as sec. 71 of the former Judicature Act) being allowed, be stayed pending the appeal except in certain specified cases.

There are four of these excepted cases, and there was a similar number under the former Rules.

* 75. Subject to sections 72 and 73 of this Act, an appeal shall lie to a Divisional Court of the High Court in the following cases:— . . . 2. From the Master in Ordinary except as to decisions or rulings upon questions of practice, or in his jurisdiction in Chambers.

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The first and second are substantially the same in both; the third is the same in both, save a slight verbal difference and the omission from the present provision of a class of cases excepted by the former Rule in these words "also, in case the judgment is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency."

The provision as to the fourth class in the former is dropped from the present Rules; it was as follows:—

"(4) If the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security, to the satisfaction of the Court appealed from or a Judge, that if the judgment, or any part thereof, be affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed if it be affirmed only as to part, and all damages awarded against the appellant on the appeal."

Another class, not to be found in the former Rules, is provided for by clause (d) of sub-sec. (1) of Con. Rule 827, viz., where the judgment appealed from awards a mandamus or an injunction, and it is provided that in these cases "execution shall not be stayed except upon application to the Court appealed to or a Judge thereof, and upon such terms as may seem just."

And by the new Rules power is given to the Court appealed to or a Judge thereof upon special application, to "order that execution shall not be stayed, in whole or in part, except upon such terms as may seem just," or to order that execution be stayed without the giving of any security, upon such terms as may seem just. And lastly it is provided as follows by Rule 829: "Where execution of the judgment or order appealed from has become stayed all further proceedings in the action in the Court appealed from, other than the issue of the judgment or order and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by the Court appealed to or a Judge thereof; and the order may be on such terms as may seem just."

These changes were consequent upon the legislation by which a defeated litigant in the High Court was limited to one appeal and given the right to appeal either to the Court of

Appeal or to a Divisional Court at his election. On appeals to a Divisional Court it has never been the practice to require the appellant to give any security, and the present Rules were a compromise between that practice and the then existing practice on appeals to the Court of Appeal, and, as has been seen, the practice of requiring, as a condition to a stay of execution, that the appellant should give security for any money he was required by the judgment appealed from to pay was abandoned, and it is not "execution" merely, but "the execution of the judgment or order appealed from," that is to be stayed on the security mentioned in Rule 826 being allowed; as to this see *Gamble v. Howland* (1852), 3 Gr. 281, at p. 308.

It is quite clear, we think, and indeed the contrary was not contended before us, that, upon the security given by the appellant company under Rule 826 being allowed, all further proceedings in the action in the High Court except the issue of the judgment and the taxation of costs became stayed, unless the case is brought within some or one of the exceptions mentioned in Rule 827.

It was, however, contended by the respondent's counsel that, inasmuch as the judgment directed that upon the partition being made the appellant company should convey to the respondent the lands allotted to him in severalty and give him possession of them, the case came within the exceptions mentioned in clauses (b) and (c) of sub-sec. 1 of Rule 827.*

This contention is not, in our opinion, well founded. If it were, it would follow that there could be no stay unless so ordered on special application by the Court of Appeal or a Judge of that Court, because until partition had been made and

* (b) If the judgment appealed from directs the execution of a conveyance or any other instrument, execution shall not be stayed until the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the judgment of the Court appealed to.

(c) If the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been given to the satisfaction of the Court appealed from, and in such sum as that Court or a Judge thereof directs, that during the possession of the property by the appellant he will not commit or suffer to be committed any waste on the property, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal.

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the part of the lands allotted to the respondent in severalty had been ascertained the appellant company could not comply with the requirement that it shall execute and deposit the conveyance or instrument which is by the judgment appealed from directed to be executed by it.

It seems to us to be a more reasonable view of the meaning of clause (b) to limit its application to cases in which the conveyance or instrument directed to be executed is one that it is possible for the appellant, if so minded, at once to execute, and that it is not to be applied where it is impossible, as in this case, to execute the instrument until after the proceedings in the action have been brought practically to an end.

Nor do we think that upon a reasonable view of the meaning of clause (c) the case is within it. In a certain sense the judgment directs the delivery of possession of property by the appellant company, but that is to take place, and can only take place, after the partition has been effected, and the result of applying its provisions to the present case would be that unless a special order were obtained under sub-sec. 2, the reference must go on and proceed to a conclusion and all the expense attending it be incurred to no purpose if the appeal should be successful.

This clause also is, we think, to be limited to cases where it is possible for the appellant, if so minded, to deliver possession, and is not to be applied where that of which he is to deliver possession is not ascertained and not ascertainable until the completion of the proceedings which the judgment directs to be taken for allotting it in severalty to the party to whom, after that has been done, possession is to be delivered.

As it appears to us, no inconvenience will result from this construction being given to clauses (b) and (c), for in a proper case it always will be open to the respondent to obtain an order under sub-sec. 2 imposing upon an appellant such terms as may be reasonable to prevent any injury being done to the respondent by the failure of the appellant to conform to the terms of the judgment as to the execution of the conveyance or the delivery of possession in the event of the judgment being affirmed.

As to security against waste being committed, the same considerations apply, and, besides, the judgment appealed from

contains provisions which we apprehend would enable the Court to protect the respondent, to the extent at all events of giving him damages for any injury he may sustain from such a cause as that.

The appeal will therefore be allowed, but, as the questions dealt with are new, the costs of it here and below will be costs in the reference.

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E. B. B.

[IN THE COURT OF APPEAL.]

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C. A.

1902

Nov. 24.

Landlord and Tenant—Valuation of Buildings—Extension of Time for Making Award—Interest.

By a lease made on the 1st November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuers or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid by the lessors, with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the valuers or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the lands and buildings was given up by the lessees to the lessors on the 31st October, 1900 :—

Held, OSLER, J. A., *dubitante*, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent., and for the remainder of the time at the legal rate of five per cent.

Judgment of a Divisional Court, 3 O.L.R. 519, varied.

AN appeal by the defendants from an order of a Divisional Court, 3 O.L.R. 519, reversing the judgment of MacMahon, J., in favour of the defendants, upon a special case submitted as to the right of the plaintiffs, the representatives of the original lessee, to interest upon the amount fixed by valuers as the

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value of certain buildings to be paid for by the defendants, the representatives of the lessors, under the circumstances stated in the former report and in the judgments printed below.

The appeal was heard on the 30th April and 1st May, 1902, by OSLER, MACLENNAN, MOSS, and GARROW, J.J.A. (counsel for both parties consenting that it should be heard by a Court of four Judges).

James Bicknell, for the appellants. Interest will be allowed only in cases of contract therefor, or in cases where the principal has been wrongfully withheld: *Ewell on Fixtures*, pp. 346-352; *Dominion of Canada v. Provinces of Ontario and Quebec* (1895), 24 S.C.R. 498, at p. 523; *Caledonian R.W. Co. v. Carmichael* (1870), L.R. 2 H.L.Sc. 56. By the contract in this case, the value of the buildings could not be paid until it was ascertained. Equitable doctrines as to contracts of sale of land and specific performance are not applicable. [MACLENNAN, J.A.: But equitable rules are now to prevail.] *Kendall v. Hamilton* (1879), 4 App. Cas. 504, at pp. 516-7, *per* Lord Cairns, L.C., shews how that provision of the Judicature Act is to be applied. By the contract of the parties the term ceased on the 1st November, 1900; the plaintiffs were to have a lien for the value of the buildings, but no right of occupancy. Under these circumstances, there can be no right to interest: *Fry on Specific Performance*, 2nd ed., sec. 1382; 3rd ed., sec. 1409; *Encyc. of Laws of England*, vol. 12, p. 430; *Catling v. Great Northern R.W. Co.* (1869), 21 L.T.N.S. 17, 18 W.R. 121; *Biggs v. Feeehold Loan and Savings Co.* (1900), 31 S.C.R. 136.

F. E. Hodgins, for the plaintiffs. The agreement of the parties was not for a forfeiture of the buildings, but in effect for a sale of the buildings. The intention of the parties governs. The lessee agrees to sell the buildings at the end of the term, and the value is to be a charge on the land. The buildings are to be valued as at the 1st November, 1900. The buildings are not chattels, but fixtures, and therefore are real estate, and interest should be paid on the purchase money from the date of possession: *Randolph on Eminent Domain*, sec. 279; *Dart on Vendor and Purchaser*, 6th ed., pp. 708-811, 713, 715; *Dyer v. Hargrave* (1805), 10 Ves. 505; *Rhys v. Dare*

Valley R.W. Co. (1874), L.R. 19 Eq. 93; *In re Shaw and Corporation of Birmingham* (1884), 27 Ch. D. 614; *Ex p. Dean and Chapter of Durham* (1856), 4 W.R. 419; *Attorney-General v. Dean and Chapter of Christ Church, Oxford* (1842), 13 Sim. 214; *In re Pigott and Great Western R.W. Co.* (1881), 18 Ch. D. 146; *Re Macpherson and City of Toronto* (1895), 26 O.R. 558; *Marsh v. Jones* (1889), 40 Ch. D. 563; *Gordillo v. Weguelin* (1877), 5 Ch. D. 287; *Amos & Ferrard on Fixtures*, p. 19; *Lee v. Risdon* (1816), 7 Taunt. 188; *Hallen v. Runder* (1834), 1 C. M. & R. 266; *Ewell on Fixtures*, p. 78; *Birch v. Joy* (1852), 3 H.L.C. 565.

Bicknell, in reply. The contract is not for sale; it is just a contract to pay for buildings erected on the land, instead of permitting the lessees to remove them. The liability is one of contract, and governed by the contract to pay when the amount is ascertained: *Vickers v. Vickers* (1867), L.R. 4 Eq. 529.

November 24. MACLENNAN, J.A.:—By a lease made on the 1st November, 1879, a parcel of land on King street, Toronto, was demised for a term of 21 years by George and Elizabeth White to Charles Potter, and the plaintiffs are the representatives of the lessee, and the defendants the representatives of the lessors. The lease is expressed to be a demise of the land, "but not the buildings thereon." The meaning of that exception was that the buildings did not belong to the lessors, but to a previous tenant, who had a ground lease only, and from whom Charles Potter had bought or was about to buy the same for the sum of \$8,500. The lease was to expire on the 1st November, 1900, and it was agreed that all the buildings on the land at the end of the term should be valued by valuers or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the said 1st day of November. It was further agreed that within six months from the said 1st November the value of the buildings and improvements found by the arbitrators should be paid, with interest at the rate of seven per cent. per annum from the said 1st day of November, 1900, and that until paid it should be a charge on the land.

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By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the valuers or arbitrators, or a majority of them, might by writing under their hands extend the same. The special case admits that the time was duly extended until and including the 30th November, 1901, on which day an award was made fixing the value of the buildings at \$10,335. The possession of the land and buildings was given up by the plaintiffs to the defendants on the 31st October, 1900. The question for our determination is, whether, under these circumstances, the plaintiffs are entitled to any interest on the value of the buildings from the 31st October, when possession was given up to the defendants, to the 30th November, 1901, when the award was made, and also at what rate.

It does not appear what the reasons were for the award not having been made within the time originally agreed upon, nor why the time was extended, and the award not made until thirteen months after the expiration of the term, and we must suppose that the extension of time and delay were agreed to for the convenience of both parties, and without the fault of either.

When the extension of time of the 23rd October, 1900, was agreed to, it was still possible to make the award within the time originally limited, and if that had been done the defendants would have had to pay interest at seven per cent. per annum for any delay in payment after the 1st November, 1900, and until six months from that day, after which it would be at the legal rate of five per cent: *St. John v. Rykert* (1884), 10 S.C.R. 278; *People's Loan and Deposit Co. v. Grant* (1890), 18 S.C.R. 262. So also interest would be payable if the award had been made at any time within the six months next after the expiration of the term, for the covenant for payment within that time would still be capable of fulfilment, and therefore still in force, and if the award was made on the very last day of the six months, I think the defendants would still be obliged to pay six months' interest from the 1st November, 1900, at seven per cent.

The award, however, not having been made within the time limited for payment, it was impossible for the defendants to

pay within that time, and, although they do not dispute their liability to pay the value fixed by the award, they dispute the obligation to pay interest. They say that that obligation was done away with by the extension of time. They say that the effect of the extension was, that, although if the award had been made one day before the six months had expired, they would have had to pay interest, yet if made one day after they would not—which would be a rather startling result.

In *Birch v. Joy*, 3 H.L.C. 565, which was a case of a contract for a sale of an estate, there had been a variation of the original contract by a subsequent agreement, and Lord St. Leonards said, p. 591, that the only true mode of ascertaining the real intention of the contract was to consider it at first without reference to the second agreement.

Doing that in this case we see that the intention was that, inasmuch as when the term expired the title to the buildings would at once vest in the lessors without any conveyance, would merge in the freehold, and the lessors would at once be entitled to possession and to the rents and profits, the lessees should have interest on the purchase money of the buildings from that time, in case the lessors required time, not exceeding six months, to make payment. That agreement accorded with what was fair and just between the parties, and with the doctrine of courts of equity in cases of sales such as this. That doctrine was clearly stated by the same Judge in the case already referred to in a passage just preceding that already quoted. He said, speaking with reference to the contract then before the Court, "This contract, if it had been executed by a court of equity, would have been executed according to equity and good conscience, and according to the rules of the Court, upon which there cannot be a doubt, nor has there been any difference at the bar. From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase money, and that purchase money not being paid by the man who was receiving the rents, would have carried interest, and that interest would

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have belonged to the seller as part of his property. A court of equity, as a general rule, considers this to follow. The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they exchange characters in a court of equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate. That is the settled rule of a court of equity."

Now the present contract was drawn conformably to this settled rule of equity, inasmuch as the lessors would have a complete title and possession on the 1st November, and if they required time to pay they were also to pay interest, and the lessee was to have a lien on the estate as security until payment was made. By that agreement the award was to be made at or before the end of the term. But, finding that the award could not be made before the end of the term, the time was extended by mutual consent. There is not a word in this new agreement changing or varying the original contract in any other respect, and so the provisions of the latter must stand and have effect as far as possible, except so far as necessarily interfered with by reason of the extension. Now it appears to me that the original agreement can and ought to stand in everything except as to the time of payment. That was to be within six months after the expiration of the term. By the consent of parties the award was not made until after that time, and so the payment could not be made until afterwards. The time for payment was in effect postponed by consent. No new day or time was named, and so payment would be due when the award was made and published. But that did not do away with the agreement to pay interest from the 1st November, 1900. That still stands as an essential part of the original agreement, and is still binding on the defendants. I suppose no one would argue that payment of interest was dispensed with by a subsequent agreement that the amount of the award might be paid within twelve months instead of six months as provided in the original deed.

It was argued that interest was agreed to be paid as the consideration for time for payment after the amount to be paid was ascertained. That is plausible, but it is a mere guess. A

better guess would, I think, be that it was agreed to be paid because it would be unjust that the lessors should have the buildings at and from the 1st November, but that the lessees should not have their money until some later day, and without interest.

In *Rhys v. Dare Valley R.W. Co.*, L.R. 19 Eq. 93, which was a case of land taken by the company, and of which they had entered into possession, the amount of compensation to be paid to the landowner was referred to arbitration. An award was made, but was afterwards set aside and sent back to the arbitrators. No binding award, however, was made, and the compensation was ultimately assessed by a jury in an action at £2,000, five years after possession taken. The landowner claimed interest on that sum from the time the company took possession, and his claim was conceded, Bacon, V.-C., quoting the language of the Lord Chancellor in *Birch v. Joy*, and adding: "If I were to withhold payment of interest I should not only be going against the cases which have been cited, but I should be going against common sense, justice, and honesty."

In *In re Pigott and Great Western R.W. Co.*, 18 Ch. D. 146, Jessel, M.R., held the railway company liable to pay interest not merely from the time when they actually took possession, nor from the date of the award ascertaining the amount of the purchase money, but from the time when the company might prudently have taken possession, resting his judgment upon the ordinary rules as between vendor and purchaser, and referring with approval to *Rhys v. Dare Valley R.W. Co.*; and if I had not come to the conclusion that the agreement for the payment of interest was left in full force by the extension of the time for making the award, I should still have been of opinion that the vendors were entitled to interest at five per cent. from the expiration of the term.

By the original agreement the vendors were only to have interest at seven per cent. for six months, so I think they cannot have it at that rate for any longer period under the agreement as altered by the extension of time. The judgment has allowed interest at seven per cent. for thirteen months, and I think it ought to be varied to that extent. There should be interest at seven per cent. for six months, and after that at five per cent.

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GARROW, J.A. :—In my opinion, the correct mode of solving the questions involved in this appeal is by considering and construing the written agreement contained in the indenture of lease set forth in the case, and written variations thereof contained in the agreement dated 23rd October, 1900, because it is, I think, beyond question that, except as specifically altered by the second agreement, the first agreement stands and is in full force and binding upon both parties.

The original agreement provided that the buildings, etc., on the demised premises at the end of the term should be valued by three persons, one to be chosen by the lessors, one by the lessee, and the third by these two so chosen; that the reference should be made and entered upon and the award made within six months next preceding the 1st day of November, 1900; and that within six months from the said 1st November, 1900, the value as found by these arbitrators should be paid with interest at seven per cent. from the said 1st November, 1900; and that until payment the amount should be a charge upon the demised premises.

This agreement was varied by the second agreement, of 23rd October, 1900, which latter agreement is in the words following :—

“In the matter of a lease dated the 1st day of November one thousand eight hundred and seventy-nine, between George Hazelton White and Elizabeth White as lessors, and Charles Potter, now deceased, as lessee. Whereas by said indenture it was agreed by and between the said parties hereto that all the buildings and improvements now erected or hereafter to be erected and made on the said demised premises and standing and being thereon at the time of the said term, but not the trade fixtures, be valued by three indifferent persons, one to be chosen by the lessors, their executors, administrators, or assigns, one by the lessee, his executors, administrators, or assigns, and the third by the said two persons so to be chosen as aforesaid, the award of the said valuers or arbitrators or any two of them to be valid and binding on the parties hereto.

“And whereas it is further agreed that the said reference should be made and entered upon and the award made between the said parties within six months next preceding the first day of November, one thousand nine hundred,

"Now it is hereby agreed by and between A. T. Wood and Elizabeth White, on the one hand, and the Toronto General Trusts Corporation, on the other, being the parties now entitled and liable under the said lease to carry out the aforesaid provisions, that the time aforesaid, namely, the 1st day of November, 1900, shall be extended until the 1st day of December, 1900, and until such further day as the said persons to be chosen as aforesaid, or a majority of them, may by writing under their hand extend the same."

The effect of the original agreement was a sale by the lessee to the lessors of the buildings as they stood at the end of the term on the 31st October, 1900, at a valuation based upon their then value, such valuation to be made within the last six months of the term, and the amount to be payable by the lessors within six months after the end of the term, with interest at seven per cent. until payment, within such period of six months. Under this agreement, if it had remained as originally made, the award must have been made on or before the 1st November, 1900, and the lessors could have at once paid the amount, and so saved themselves interest. If they so elected, they need not have paid for a period of six months after the 1st November, 1900, but in such case they would have been liable to pay interest at the somewhat unusual rate of seven per cent., a rate of course not so unusual when the agreement was made, twenty-one years before. And if the money was not paid at the end of this period of six months, and the lessees had been compelled to bring an action for its recovery, they would have been allowed the legal rate only, as interest after the six months.

Then came the second agreement, which, it is said, creates the ambiguity. To me it is clear that all that the parties intended to do by that agreement was to postpone the date of making the award.

The agreement itself is made eight days before the time for making the award under the first agreement had expired. There was still therefore apparently time enough to have made an award before the end of the term, and the extension so far as appears may well have been simply by way of precaution.

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If, notwithstanding the extension, an award had actually been made on or before the 1st November, 1900, no one would, I daresay, have contended that the original agreement had, as to either the time of payment or the rate of interest until payment, been altered or affected.

The extension stipulated for was apparently only primarily for one month, that is, to the 1st December, 1900, but, as it happened, under the power given in the second agreement to the arbitrators the time was further extended, and the award was not actually made for many months afterwards. This circumstance cannot, of course, be allowed to affect the proper construction of the agreement. We are not informed, it is no part of the special case, who asked for or proposed the extension. It may have been the lessors themselves, or it may have been the lessees. All we know is, that without fault on either side, for no fault is complained of in the case, an extension of time for the making of the award was agreed upon. It appears to me that the proper conclusion is, to treat the new agreement as a waiver by the lessors of the term in the original agreement that the award should be made on or before the end of the term, so that they might pay the amount without incurring interest. This term was in the nature of a condition precedent, although not actually in the circumstances such a condition. But, whatever it was, the true effect of the second agreement is, I think, to read it as if the lessors were saying: "True, we agreed to pay the value as of the 1st November, 1900, on that day or within six months afterwards, and seven per cent. interest during such period, if we kept the money so long, but on condition that the award should be made and the amount fixed, so that we might have the option of paying or not paying in cash, but we now, for sufficient cause, waive the benefit of this option, and will pay the value as ultimately fixed as on the 1st November, 1900, with interest at seven per cent. as long as we keep the money, but not exceeding the original period of six months after the 1st November, 1900."

What was to happen in the event which actually did happen, of the award not being actually made within this period of six months, was not, I think, in the contemplation of either of the parties, and has not for that reason been provided for either

by the original agreement, or by the subsequent one varying it. What then, in such a case, should be the proper legal result? This is, of course, not a question of construction. The agreements, themselves, do not, I think, carry the matter of interest beyond a period of six months after the 1st November, 1900, and it therefore as to any subsequent interest becomes a question of what the law would imply in the absence of any express agreement on the subject. If the original agreement had stood unaltered, and payment had not been made at the end of the period of credit, the limit of the lessors' obligation as to interest would have been at the rate of five per cent., not seven: *People's Loan and Deposit Co. v. Grant*, 18 S.C.R. 262.

If the original agreement had contained no express stipulation as to interest, the lessors, who as purchasers were in possession from the 31st October, 1900, would have been charged with interest at the legal rate of five per cent., upon well known equitable principles; and it therefore appears to me that the proper conclusion as to the interest subsequent to the period of six months from the 1st November, 1900, is that it should only be calculated at the rate of five per cent., because, as I have indicated, I can find no agreement by the lessors to pay the higher rate for a longer period than up to the end of six months after the 1st November, 1900. This construction gives, I think, full effect to the original agreement as subsequently varied, and accords with what I regard as justice between the parties.

The judgment appealed against allowed interest for the full period from the 1st November, 1900, to the award, at seven per cent., and should be varied to the extent before indicated, that is, by reducing the interest to five per cent. from the 1st May, 1901, to the date of the award on the 30th November, 1901.

Moss, J.A., concurred.

OSLER, J.A. :—My learned brothers are unanimous, and while I cannot say that I am free from doubt, I will not dissent from the conclusion at which they have arrived, especially as it is probably consonant with what is just and reasonable between the parties.

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Had the case fallen to be disposed of by me as trial Judge, I think I should have taken the view of my learned brother MacMahon, on the ground that the parties had made their own agreement about the interest, and that, having subsequently varied the terms of the reference in such a way as to make it impossible (so I should have said) that the interest should be paid in accordance with the agreement, that is to say, upon an award or valuation to be made by the 1st November, 1900, the earliest and only date from which it could be payable, under the altered circumstances, was when the value should be ascertained under the award made by the later date agreed upon. Interest was to be payable upon a sum to be ascertained, and from a specified date, because the principal sum was to be ascertained before that date, and from payment of any interest the reversioner could relieve himself by payment of the principal when ascertained.

The effect of the subsequent enlargement of the time for ascertainment of the amount of the principal changed all this, and put an end, I should have thought, to the entire contract to pay interest. And it appeared to me that there was neither room nor reason for the application of the equitable rule as between vendor and purchaser, where the latter has taken possession of the property sold, partly because the parties had made their own bargain about the interest and had put an end to it, and partly because it is not the ordinary case of vendor and purchaser, as the reversioner had the right to the possession of his land at the end of the term, and therefore necessarily also of the buildings, the valuation of which was delayed by no fault of his, as was the case in *Marsh v. Jones*, 40 Ch. D. 563. It may be that having had the benefit of the possession of the buildings—though he surely was not bound to refrain from taking it—it is reasonable that he should pay interest on their value, and a construction of the contract which leads to that result is at least persuasive, though I am unable to yield to it *ex animo*, or express more than what the late Sir Adam Wilson, C.J., sometimes called “a grumbling assent.” The judgment below must, at all events, be varied in respect of the rate of interest allowed for part of the period, and, subject to this, the appeal must be dismissed without costs.

E. B. B.

[DIVISIONAL COURT.]

HOLMES V. TOWN OF GODERICH.

D. C.

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Dec. 16.

Municipal Corporations—Borrowing Powers—"Ordinary Expenditure"—School Purposes—R.S.O. 1897, ch. 223, sec. 435—Costs.

The power conferred upon a municipality by the Municipal Act, R.S.O. 1897, ch. 223, sec. 435, of borrowing money to meet current expenditure is distinct from the power conferred by that section of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed eighty per cent. of the amount collected in the preceding municipal year for the current expenditure of the municipality apart from the expenditure for school purposes.

An outlay which is not contemplated when the estimates are prepared, and for which no provision either special or as a possible contingency is made in the estimates for the year, cannot be treated as part of the ordinary expenditure to meet which a loan may be effected.

Where the statutory limit had been exceeded, but before the action was tried, the money had been repaid, the plaintiff, who sued on behalf of himself and all other ratepayers, was held entitled to have the merits of the case disposed of, and, in the result, his costs awarded to him, and this although the borrowing had taken place to enable the municipality to carry on prior litigation pending between the plaintiff and the municipality.

Judgment of Robertson, J., reversed.

APPEAL by the plaintiff from the judgment at the trial.

The plaintiff sued on behalf of himself and all the other ratepayers of the town of Goderich; the defendants were the corporation of the town of Goderich, the mayor and treasurer of the town, and the Bank of Montreal.

The writ was issued on the 12th of December, 1901, to restrain the defendants from discounting or in any way dealing with a note, or the proceeds of the same, for \$2000 in the Bank of Montreal to provide funds to pay into the Supreme Court of Canada upon an appeal by the defendants, the corporation of the town of Goderich, in an action in which the present plaintiff Holmes was plaintiff, and the said corporation were defendants; and for the delivery up of the said note for cancellation. It appeared from the admissions and evidence that the plaintiff Holmes had brought a former action against the corporation of the town of Goderich, in which, after much difference of judicial opinion, he had recovered judgment in the Court of Appeal for \$1,200 and costs: the defendants appealed to the Supreme Court, and finding difficulty in obtaining the necessary sureties to a bond, borrowed the money on the 10th

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of December, 1901, from the Bank of Montreal upon a note, and paid it into Court as security on the 21st of December, 1901. An injunction was obtained *ex parte* on the 12th of December, 1901, by the plaintiff from the local Judge of the High Court at Goderich, which was dissolved by Meredith, C.J., C.P., in the February following. In the meantime the money had been paid into Court under circumstances not appearing in the papers used upon the present motion, but which were held to explain satisfactorily the payment in.

The action came on for trial before Robertson, J., at Goderich, on 3rd of March, 1902, and on the 12th of May, 1902, he gave judgment dismissing the action with costs.

The plaintiff's appeal from this judgment was argued before the Divisional Court [FALCONBRIDGE, C.J., K.B., and STREET, J.], on the 5th of November, 1902.

Proudfoot, K.C., for the plaintiff.

E. L. Dickinson, for the defendants other than the Bank of Montreal.

December 15. The judgment of the Court was delivered by STREET, J. (after stating the facts as above set out):—The ground relied on by the plaintiffs is that the defendants, the corporation of the town of Goderich, had no power to borrow the money in question.

The borrowing can be supported, it seems to me, only under sec. 435 of the Municipal Act, if it is to be supported at all. A by-law was passed under that section on the 15th of February, 1901, reciting that it was desirable and necessary to make provision for the borrowing of money for the current expenditure of the corporation until such time as the taxes levied therefor could be collected. The by-law then proceeds to empower the mayor and treasurer of the corporation to borrow \$15,000 upon the notes of the corporation, countersigned by them.

On the 17th of May, 1901, another by-law was passed amending this by-law by increasing the amount authorized to \$22,000. A note for \$2,500 under this by-law was made by the mayor and treasurer on the 10th of December, 1901, and \$2000

was on that day advanced to them for the purpose of being paid into Court as security upon the appeal in the then pending case of *Holmes v. Goderich*. Including that note, the total amount then under discount with the bank under the by-laws above mentioned was \$19,500.

The question of the right to borrow this sum turns upon the meaning to be given to the various portions of sec. 435 of the Municipal Act.

The general object with which that section was passed is sufficiently obvious. It is the duty of the council to make an estimate of the expenditure for the coming year, and to strike a rate and levy taxes to meet it: but the taxes cannot be immediately collected, and money is required from day to day after the year begins to meet daily demands provided for in the estimates. It is necessary that the corporation should have funds at once, and they are authorized to borrow for the purpose of meeting the demands upon them: but in order that they may be prevented from making use of this authority to a greater extent than that intended, the amount they are permitted to borrow and the period of the loan are strictly limited, with the plain intention that the amount borrowed shall be paid out of the taxes, for the year in which it is borrowed, as they are collected.

I think it is plain that the intention of the section was to separate the amounts estimated for school purposes from the amounts estimated for other purposes, because the school funds are separately dealt with under the 4th sub-section. There is good reason for this separation: the municipal corporation merely collects and holds for the school corporations the taxes it levies at their request, and they should obviously be kept apart for school purposes and not be confused with the ordinary current expenditure of the town.

Therefore, when the town corporation seeks to borrow money under the 1st and 2nd sub-sections of section 435 for the ordinary current expenditure of the municipality, it is limited to eighty per cent. upon the amount collected for taxes in the preceding year, exclusive of taxes collected for school purposes. When it seeks to borrow money for the purpose of paying it over to the school corporations, it must recite in the

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by-law that it is borrowing it for school purposes under sub-section 4, and it can then borrow to the full amount of the estimates submitted by the school corporations.

The by-laws under which the defendants seek to justify the present borrowing recite that it is for "the current expenditure of the corporation:" for the reasons I have given, I think this cannot include expenditure on account of school funds, and so in calculating the eighty per cent. which the corporation may properly borrow, the sums levied for school purposes must be omitted.

Now, the amounts estimated in 1900 for which taxes were levied were as follows:—

General purposes,	-	-	-	-	\$17,093.94
Schools,	-	-	-	-	7,950.00
County rate,	-	-	-	-	924.70
Debentures,	-	-	-	-	3,755.48

\$29,724.12

Deduct from this the school funds, - 7,950.00

\$21,774.12

80 per cent. of this, - - - \$17,419.26

It is admitted that the amount under discount in the bank before the \$2,500 was borrowed was \$17,000, and therefore \$419.26 was the utmost sum which the town corporation could borrow under the construction I have placed upon the provisions of sec. 435.

I think the borrowing was objectionable on another ground. By sub-sec. 3 of sec. 435, the powers conferred by the section "shall not be exercised except for the purpose of meeting the ordinary expenditure of the municipality." It is admitted that no provision was made in the estimates for the year 1901 for this sum of \$2000. An outlay which was not contemplated when the estimates were prepared, and for which no provision, either special or as a possible contingency, was made in the estimates for the year, cannot possibly be deemed part of the "ordinary expenditure" for the year, without disarranging the whole financial scheme provided for by the estimates. An

exceptional case might, of course, occur when some contingency which had been provided for had been found to be unnecessary, but there is no suggestion of such a state of things here.

In my opinion, therefore, the corporation of the town and the mayor and treasurer exceeded their powers in borrowing the \$2000 in question.

The matter, however, is now only a question of costs, for the reason that before the present appeal came on for argument the Supreme Court had given judgment allowing the appeal of the town corporation with costs, and the money had been obtained back from the Court and repaid to the Bank of Montreal. Upon the authority of *Fleming v. Toronto* (1892), 19 A.R. 318, we were bound to hear and decide the merits of the appeal in order that the costs might be properly disposed of.

The personal interest of the plaintiff was urged as a reason why he should at all events be deprived of his costs: but after a good deal of consideration, I can see no solid ground why the fact of his having a special personal interest in the litigation should be considered as depriving him of his right as a rate-payer to institute proceedings to restrain the municipality from acting in excess of their powers. In my opinion, therefore, the present appeal should be allowed with costs against the defendants other than the Bank of Montreal, who are not parties to it; and the same defendants should pay the costs of the action. There seems to be no necessity for any other judgment in the action, as there is nothing now to be ordered or restrained.

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[IN THE COURT OF APPEAL.]

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Nov. 24.

MORRISON V. THE GRAND TRUNK R. W. CO.

Discovery—Examination for—Officer of Company—Engine Driver—Consolidated Rule 439.

On application for leave to examine an engine driver for discovery, under Consolidated Rule 439, as an officer of the defendants, in an action under R.S.O. 1897, ch. 166, The Fatal Accidents Act:—

Held, reversing the decision reported 4 O.L.R. 43, that, inasmuch as the engine driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control of the train, so as to make him responsible to the defendants, except for the management of his engine, he was not an officer of the company examinable under that Rule.

THIS was an appeal by the defendants from the judgment of the Divisional Court, reported 4 O.L.R. 43, upon a motion by the plaintiff for an order allowing her to examine as an officer of the defendants within the meaning of Con. Rule 439, one William Spratt, the driver of the engine attached to the defendants' train at the time of an accident which caused the death of the plaintiff's husband, and on account of which the plaintiff brought this action for damages. The plaintiff had previously examined another person as an officer of the defendants.

The appeal was argued on May 15th, 1902, before OSLER, MACLENNAN, MOSS, and GARROW, J.J.A., and BRITTON, J.

D. L. McCarthy, for the defendants, contended that, though it might be different if the plaintiff having first examined an officer of the defendants had been unable to get the information he wanted from him, and had then applied for an order to examine the engine driver, he could not primarily examine the engine driver as an officer of the company: *Dawson v. London Street Railway Co.* (1898), 18 P.R. 223; that the Railway Act, R.S.C. 1886, ch. 109, nowhere mentions an engine driver as an officer of the company; that nothing in *Leitch v. Grand Trunk R. W. Co.* (1888), 12 P.R. 541, 671, removes the necessity of the party to be examined under Con. Rule 439 being an officer; he must be an officer whose answers shall bind the company; and Con. Rule 461 (2), providing that the whole or any part of the

examination of such an officer may be used as evidence by any party adverse in interest to the corporation, and shall be evidence accordingly, was passed since the *Leitch* case; that so far a conductor was the lowest "officer" recognizable by the Courts in the case of a railway company, and the Court should not lower the meaning of the term to an engine driver, a brakesman, or a baggage-man; that the endeavour of the plaintiff here was to make evidence; and that the evidence shewed that the engine driver never had charge of the train in this case.

J. G. O'Donoghue, for the plaintiff, contended that the engine driver alone could give information at first hand on some material points in question in this action; that the Railway Act, 51 Vict. ch. 29, secs. 214 (9), 243 and 292 (D), draws a distinction between the chief officers and the other officers, and recognizes even telegraph operators as officers; that the defendants' rules shew that onerous duties were placed on engine drivers, and that the conductor of a train having been killed, the engine driver must be held to have been in charge; that more than one person may be in charge of a train at the same time with different duties: *McCord v. Cammell & Co.*, [1896] A.C. 57. As to who had been held to be officers, he referred to *Ramsay v. Midland Railway Co.* (1883), 10 P.R. 48; *Odell v. City of Ottawa* (1888), 12 P.R. 446; *Leitch v. Grand Trunk R.W. Co.* (1888-1890), 12 P.R. 541, 671, 13 P.R. 369; *The Canada Atlantic Railway Co. v. Moxley* (1888), 15 S.C.R. 145; *Leach v. Grand Trunk Railway Co.* (1890), 13 P.R. 467; *Dawson v. London Street Railway Co.* (1898), 18 P.R. 223; *Casselman v. Ottawa, Arnprior and Parry Sound Railway Co.* (1898), 18 P.R. 261.

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November 24. OSLER, J.A.:—The case of *Leitch v. Grand Trunk R.W. Co.*, 13 P.R. 369, binds us to hold, and, so far as I am concerned, for the reasons there given by me, that the conductor of a railway train may be examined as an officer of the defendants within the meaning of Rule 439 (1), the language of which is the same as that of the old Consolidated Rule 487, and R.S.O. 1877, ch. 50, sec. 156.

The question now is whether the engine driver is an officer who may be so examined. I have considered the reasons

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given by me in the opinion I delivered in the case cited, and while abiding by what I said there, do not think I said anything which obliges me to hold that the engine driver is a person on the same plane as the conductor, as possessed of the degree of authority or control over the train which there led me to the conclusion that the latter might be regarded as an officer. He did not in fact in the present case become conductor under the rules of the company in place of the conductor whose death has given rise to the action, as a person superior in authority to both of them was then on the train and took charge of it.

The whole question of the examination for discovery of officers of a corporation is full of difficulty, which might be solved in one direction perhaps by treating the word officer as merely a synonym for servant, and regarding these as convertible terms. This, if not actually decided, appears to be the result of the decision in the Court below, but I am not prepared to go so far or to give the former word the wide meaning contended for. There would, indeed, be no practical harm in doing so were the rules as to the use which may be made of the deposition of the person examined the same as they were when *Leitch's* case was decided, when they could not be read against the corporation, if at all, unless the latter took part in the examination.

* Rules 461 (2), (3) have made a material change in the practice in this respect, and the deposition of the officer, no matter what his grade or authority, may now be read against the corporation just as those of a natural party may be read against him under the first clause of the rule. I do not agree that the consequences are so unimportant or free from disadvantage to the corporation as one of my learned brothers in the Court below seems to think, and while perhaps it is not legitimate to construe Rule 439 (1) by looking at the consequences I have referred to under Rule 461, I think these fully justify us in saying that we ought not to extend the meaning of the word officer in the former rule, or carry the cases further than they have already gone. It might be quite reasonable to examine for discovery merely any officer or servant of a corporation, but to allow this examination to be used as evidence against the corporation in the same way as that of a natural person may be used against himself, is a practice the justice of which, in

many cases at all events, is not so clear. The plaintiff or defendant, as the case might be, could obtain everything he ought to obtain in the way of discovery if Rule 439 were enlarged so as to admit of the examination of officers and servants of the corporation, and the 2nd and 3rd clauses of Rule 461 might in that case be repealed without injustice to any one. The persons examined for discovery would then be examined, as they should be, as witnesses at the trial, while any difficulty in obtaining their evidence then would be obviated by examining them in like manner under the Rules 485, 486.

It appears to me, therefore, with all deference, that we should allow the appeal.

MACLENNAN, J.A.:—With considerable doubt I agree that the appeal should be allowed.

At the time of our decision in *Leitch's* case, 13 P.R. 369, the officers of corporations could only be examined before trial for purposes of discovery, and the depositions could not be read against the corporation. I thought and held in that case that the Rule applied to every officer of a corporation who might reasonably be supposed to possess knowledge of the facts, discovery of which was sought. If the depositions could at that time have been read against the corporation, I think I would not have put so wide a construction upon the Rule.

Since that case was decided, however, by an amendment of the Rules such depositions may be read against the corporation, and the question is whether that amendment has narrowed the scope of the Rule as to the class of officers who may be examined. While I think my judgment in *Leitch's* case was right, I incline to think, upon the whole, that the new use which may be made of the depositions makes it proper that we should allow the appeal.

MOSS, J.A.:—The single question presented for decision in this appeal is whether the driver of the engine attached to the defendants' train of passenger cars, of which the deceased John Morrison was in charge as conductor when the accident happened which caused his death, is an officer of the defendants examinable under Con. Rule 439.

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In endeavouring to ascertain whether any named person does or does not come within the term "officer" as used in the rule, it is of course essential to bear in mind its object and purpose. It is important to observe the connection in which the word is found in the rule: "A party to an action or issue whether plaintiff or defendant, or in case of a corporation one of the officers of such corporation." A party and an officer of a corporation are found so closely associated as to plainly indicate an intention to place an individual party and a corporation party as nearly as possible in the same relation and on equal terms as regards an examination for discovery.

Unquestionably, the examination to be taken under this rule is for the purpose of discovery, for although under subsequent rules the party at whose instance the examination is had may make use of it at the trial if he sees fit, he is not obliged to do so. If he does not, the other party can make no use of it, and herein it differs from evidence taken for use at the trial under Rule 485, which either party may obtain leave to use.

The party or the officer is to be examined touching the matters in question. The English Order 31, Rule 1, is not unlike Rule 439 in this respect. The interrogatories to be delivered under it are to be confined to matters in issue in the action. That was the opinion of Fry and Lopes, L.JJ., as expressed in the case of *In re Howel Morgan, Owen v. Morgan* (1888), 39 Ch. D. 316, at p. 321.

It has been decided under Order 31 that the interrogating party is not entitled to a disclosure of the evidence by which the interrogated party expects to support his case or the names of his witnesses; and in dealing with Rule 5 under the same order, the Courts seem to exercise much care in selecting the officer of a corporation who is to answer interrogatories on its behalf. The words of that Rule are "member or officer of such corporation," and the apparent inclination is not to authorize interrogation of a member where there are officers, and to consider that the officer who, from his position in the corporation's business would be the proper representative or mouth-piece of the corporation in respect of such business, is the proper officer to answer the interrogatories.

The question is fully discussed in Bray on Discovery, pp. 73-83 with reference to the decisions, to which may be added *Chaddock v. British South Africa Co.*, [1896] 2 Q.B. 153. See also Encyclopædia of the Laws of England, vol. 4, p. 277.

Neither under the English order nor under Rule 439 has it been held, as far as I am aware, that the right to interrogate or examine for discovery is intended to be more extensive in the case of a corporation party than in that of an individual party.

And there appears no support from the language of Rule 439 for placing a corporation in a less advantageous position than an individual party. I think that as nearly as possible the same sort of discovery is to be made on behalf of a corporation as is proper to be made when an action is against an individual and he is put under examination for discovery.

Speaking generally, I would say that the officer of a corporation who, if there was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of which the action arose, would, *prima facie*, be the proper officer to be examined in the first instance under Rule 439. And I would venture to say further that the fact that a person holding some position of subordinate rank or grade which some might call an office, happened to be the person whose dealing or conduct had given rise to the action, ought not necessarily to subject such person to examination on behalf of the corporation for the purposes of discovery any more than if he was an officer or employee under an individual party to an action. There is always danger in even attempting to define a term which permits of so many varying descriptions. The question of what persons are examinable under the Rule as officers of a corporation must always become more or less a question of fact, and it may generally be found more easy to say who is not an officer within the Rule than to lay down any rule for general guidance.

The first inquiry must always be whether the person sought to be examined is an officer of the corporation within the meaning of the Rule. On two previous occasions where the point involved in this appeal arose, it was held that an engine driver was not an officer within the provisions then in force, which did

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not greatly differ from the present rule: *McLean v. Great Western R.W. Co.* (1878), 7 P.R. 358; *Knight v. Grand Trunk R.W. Co.* (1890), 13 P.R. 386. In *Dawson v. London Street Ry. Co.*, 18 P.R. 223, the question was not the same, and it is not now necessary to consider whether or not it was rightly decided. In the present case the Divisional Court, advancing one step beyond *Leitch v. Grand Trunk R.W. Co.*, 12 P.R. 541, 671, 13 P.R. 369, has ruled that an engine driver in the defendants' employ, who was engaged in his ordinary business upon the engine attached to the train of which the deceased John Morrison was conductor, is examinable as an officer of the defendant corporation.

I am, with much respect, unable to agree to this conclusion. It must be conceded that the term "officer" does not include every person who holds a position in the defendants' service, however humble or unimportant that position may be. No satisfactory definition of the term can be extracted from the various sections of the Railway Act wherein it is found, but it is to be gathered that many different ranks or grades of service were present to the framer's mind. Neither is much light thrown upon the question by the defendants' rules and regulations. The material before us shews that at the moment of his death the deceased John Morrison was in charge of the train, and the engine driver was subject to his authority and bound to obey his orders and directions unless they endangered the safety of the train or required violation of the defendants' rules. Upon the conductor becoming incapacitated by the accident it would have been the engine driver's duty to take temporary charge of the train, but for the fact that the defendants' trainmaster for the district happened to be on board the train, and it thereupon became his duty to assume, and he did assume, charge of the train until he placed it under the control of another conductor.

The engine driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control, conduct and management of the train in such a way as to make him responsible to the defendants except for the management of his engine. The case is therefore different from *Leitch v. Grand Trunk R.W. Co.*,

supra, which is probably not binding on this Court except on the same state of facts. I see nothing in that case, however, that should lead us to the conclusion that the engine driver in this case is an officer of the corporation, and examinable as such under the Rule.

The decisions hitherto have not extended to a person in this man's position, and I agree with Street, J., that we should not extend the meaning of the term in order to embrace this class of employees without being clearly satisfied that they come within it. While it is but just to give the plaintiff the benefit of the Rule to the fullest extent, we must see that the defendants are not exposed to danger and possible injustice, which, if they were individuals, they could not be subjected to.

I would reverse the order appealed from, and restore the order of Street, J., the costs of the appeal to the Divisional Court to be to the defendants in the action.

As a term of granting them leave to appeal, the defendants were required to bear the respondent's costs in this Court, and the certificate will provide for this.

GARROW, J.A., and BRITTON, J., concurred.

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1903

RE DENNIS.

Jan. 10.

Will—Construction—Devise—Vested Estate, Subject to be Divested—Rents—Expenditure for Improvements.

Testator devised a farm to his grandson "when he arrives at twenty-one years of age, the said farm to be kept in repair by my executors . . . to expend at least \$50 each year in improvements," with a devise over in case of death "before receiving the share," and a residuary devise to a son and daughter:—

Held, that the land vested in the grandson by the will, subject to be divested should he die before attaining twenty-one, and that he was entitled to the benefit of the surplus of rents over and above what should be properly expended for repairs, which was to be not less than \$50 each year, but more if necessity should, in the opinion of the executors, arise.

MOTION by the executors of the will of Jarvis Dennis, deceased, for an order declaring the construction and interpretation of the will, and for the opinion and direction of the Court on certain questions arising thereunder.

The will, after certain devises and bequests to the testator's daughter and granddaughters, proceeded: "I give, devise, and bequeath my grandson Edward Jarvis Dennis the south quarter of lot 23 in the 1st concession of the township of North Norwich . . . when he arrives at twenty-one years of age, the said farm to be kept in repair by my executors hereinafter appointed to expend at least \$50 each year in improvements over and above taxes and insurance. Proviso, in case of the death of one or more of my above named grandchildren before receiving the share or shares devised to them, then that share or shares to be equally divided among the survivor or survivors of them share and share alike. All the residue of my estate not hereinbefore disposed of I give, devise, and bequeath unto my son Howard Dennis and my daughter Hannah Russell . . . to be equally divided."

The questions submitted by the executors were: (1) Whether they were limited in their expenditures each year for repairs and improvements on the farm devised to Edward Jarvis Dennis to the sum of \$50 only. (2) Whether they had power to expend the total amount of the rent received for that farm in repairs and improvements. (3) Whether the balance

of rent not expended in repairs and improvements should go to the estate of the devisee Edward Jarvis Dennis, who was an infant, or to the residuary legatees.

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The motion was heard by BOYD, C., in Chambers, on the 9th January, 1903.

T. Brown, for the executors.

G. G. Duncan, for the residuary legatees and devisees.

F. W. Harcourt, for the devisee Edward Jarvis Dennis, an infant, contended that he had a vested estate and was entitled to the surplus rents, citing the cases collected in *Theobald on Wills*, 5th ed., p. 407, and particularly *Doe d. Hunt v. Moore* (1811), 14 East 601; *Edwards v. Hammond* (1684), 3 Lev. 132.

January 10. BOYD, C.:—The contention on behalf of the infant should prevail; and the cases cited shew that the land devised to the grandson when he arrives at twenty-one is, by the effect of the proviso that, if the grandchild dies before receiving the share devised, it is to go over, to be treated as vesting in him now, but subject to be divested should he die before attaining twenty-one. See also *Phipps v. Ackers* (1842), 9 Cl. & F. 583, at p. 591.

The effect of this construction will be to give him the surplus rent of the place which remains over and above what is duly and properly expended for repairs thereon. This is to be not less than \$50 each year, but this amount may be exceeded if the necessity arises in the opinion of the executors.

Costs out of the surplus of rents; but no affidavits are to be taxed which are of a contentious nature and are not of service in presenting the neat question of law to the Court.

E. B. B.

[IN CHAMBERS.]

1902

ANTHONY V. BLAIN.

Dec. 29.

Pleading—Amended Statement of Claim—Delivery of—Irregularity—Time—Validating Order—Terms—Costs—Stay of Proceedings—Appeal—Waiver—Compliance with Terms.

After the delivery of the statement of claim an order for particulars was made, and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff, without leave and without the defendant's consent, delivered an amended statement of claim:—

Held, that the delivery of the amended statement of claim was irregular under Rule 300.

An order was made, upon the defendant's application to set aside the amended statement of claim for irregularity, validating the delivery of it, but directing that the plaintiff should pay the costs of the motion and other costs occasioned by the irregularity, and that until payment of such costs further proceedings on the charges introduced by the amendment should be stayed, or if such costs should not be paid within one month after taxation that the amendments should be struck out.

Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms, does not preclude him from moving against the order.

AN appeal by the plaintiff from an order of the local Judge at Brampton. The facts and points argued are fully stated in the judgment.

The appeal was heard by MEREDITH, C.J.C.P., in Chambers, on the 3rd October, 1902.

W. E. Middleton, for the appellant.

W. R. Riddell, K.C., for the respondent, the defendant.

December 29. MEREDITH, C.J.:—This is an appeal by the plaintiff from an order of the local Judge at Brampton, dated 20th September, 1902, by which it was determined that the amended statement of claim delivered by the appellant, without leave having been obtained to amend and without the respondent's consent, was irregularly delivered, contrary to the provisions of Con. Rule 300, but allowing the amended statement of claim to stand and directing the appellant to deliver particulars of certain paragraphs of it within ten days, and precluding him from giving evidence at the trial in support of the charges particulars of which were directed to be

delivered, in default of their being delivered as directed by the order, and also directing the appellant to pay the costs of the motion, together with the costs of the proceedings rendered unnecessary and the costs thrown away by reason of the appellant having delivered the amended statement of claim, forthwith after taxation, extending the time for delivery of the statement of defence until six days after the delivery of the particulars and payment of the costs which the appellant was directed to pay, and staying the proceedings in the action until the particulars should be delivered and the costs should be paid.

The action is for criminal conversation, and after delivery of the statement of claim an order for particulars was made and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the appellant, without leave and without the respondent's consent, delivered an amended statement of claim, and the order appealed from was made on the motion of the respondent to set aside the amended pleading for irregularity.

The appellant contends that the learned local Judge erred in determining that the amended statement of claim was irregularly delivered, and that, even if he was right in the construction which he placed upon Con. Rule 300, it was improper to direct that proceedings in the action should be stayed until the costs should be paid.

I am of opinion that the local Judge correctly interpreted the Rule, and that the delivery of the amended statement of claim was irregular.

The Rule is as follows:

"300. The plaintiff may, without leave, amend his statement of claim once before the expiration of the time limited for reply and before replying, or, where no defence is delivered before the expiration of four weeks from the appearance of the defendant who last appears."

The first branch of the Rule applies, I think, where a statement of defence has been delivered, and gives the plaintiff the right to amend without leave within three weeks after the

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Meredith, C.J. defence or the last of the defences has been delivered, unless he has delivered his reply.

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The time for delivering the reply is regulated by Con. Rule 256, and it is to the provisions of that Rule that reference is made in the earlier part of Con. Rule 300; but, where no defence is delivered, according to the provisions of the Rule the plaintiff to be entitled to avail himself of it, must amend his statement of claim within four weeks from the appearance of the defendant who last appears.

Why this limitation of time is imposed, I am unable to understand, and the reason for it I have not been able to discover, but the language of the Rule is explicit, and there is, I think, no escape from the conclusion that it operated to render the action of the appellant of delivering the amended statement of claim without leave irregular.

The terms which the learned local Judge imposed as the condition upon which the amended pleading was allowed to stand were, however, in my opinion, more onerous than the appellant should have been required to submit to, as the price of the indulgence granted to him. It was not reasonable to provide that proceedings in the action should be stayed until the costs should be paid. An indulgence was no doubt allowed, and it was not unreasonable that he should pay the costs which he is by the order directed to pay, but the stay of proceedings in default of payment should have been limited to proceedings on the additional charges introduced into the statement of claim by the amendment, and it would not have been unreasonable to have provided that in case of default in payment of the costs within a named time the amendments should be stricken out of the pleadings. As to the question of staying proceedings for non-payment of costs, *In re Wickham, Marony v. Taylor* (1887), 35 Ch. D. 272, and *Graham v. Sutton, Carden & Co.*, [1897] 2 Ch. 367, may be referred to.

It was objected by the respondent's counsel that the appellant had, by delivering particulars of the amended statement of claim pursuant to the order appealed from, precluded himself from appealing; but the objection is not, I think, well founded. Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms,

does not preclude him from moving against the order: *Anlaby v. Prætorius* (1888), 20 Q.B.D. 764; *Hewson v. Macdonald* (1882), 32 C.P. 407; *Duffy v. Donovan* (1891), 14 P.R. 159.

The appeal must, therefore, be allowed, and the 7th paragraph of the order stricken out, and there will be substituted for it a provision that until payment of the costs further proceedings on the charges introduced by the amendment be stayed, or, at the respondent's option, that if these costs are not paid within one month after taxation the amendments be struck out of the pleadings.

The costs of the appeal will be costs in the cause.

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[IN CHAMBERS.]

QUA V. CANADIAN ORDER OF THE WOODMEN OF THE WORLD

1902

Dec. 30.

Pleading—Leave to Deliver Reply—Time—Jury Notice—Discretion—Notice of Trial—Close of Pleadings.

Where an order was made by the Master in Chambers allowing the plaintiff to deliver a reply after the regular time for replying had expired, a Judge refused to interfere with the discretion exercised, although the reply was open to the objection that all that it sought to put in issue was already in issue by the statement of defence, the purpose being to enable the plaintiff to file a jury notice, and the case being one in which the plaintiff should be allowed to file a jury notice, and thus leave it to the discretion of the Judge at the trial to say whether it should be tried with or without a jury.

The pleadings were not closed until the lapse of four days (excluding the Christmas vacation) after the delivery of the reply, or until the defendants had joined issue, and a notice of trial given before the lapse of that time, and without a joinder of issue having been delivered, was irregular; and the Judge had no power to allow the notice of trial thus irregularly given to stand.

Rules 257, 258, 262, considered.

THIS action was brought by Christina Qua, trustee for Eva Margaret Qua, to recover from the defendants the sum of \$2,000 and interest upon a policy issued by the defendants upon the life of Francis Qua, deceased, the husband of Christina Qua and father of Eva Margaret Qua.

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The defendants by their statement of defence alleged that the deceased had made untrue answers to questions put to him in his application for the insurance; that the policy issued to him was void by reason of fraud, misrepresentation, and deceit used by him in procuring the same; and that he was not at the time of his death a member in good standing in the defendant Order.

The statement of defence was delivered on the 29th September, 1902.

On the 16th December, 1902, the plaintiff served on the defendant notice of a motion for an order that the plaintiff be allowed to deliver a reply to the statement of defence; and upon such motion, on the 19th December, 1902, the Master in Chambers made an order allowing the plaintiff to deliver a reply in terms set out in the order, to the following effect: that by the contract of insurance it was provided that incorrect answers or representations innocently made by the assured and with a belief in their truth should not avoid the policy; that by the defendants' by-laws it was provided that after twelve months every policy should become incontestable, provided that no information or complaint had been laid against the member charging him with misrepresentations regarding any matter material to the risk, unless wilful false statements were made or fraud practised; that the statements of the deceased complained of by the defendants came within the terms of these provisions; that the statements complained of were not material within the meaning of sec. 144 of the Ontario Insurance Act, R.S.O. 1897, ch. 203; etc.

A reply was delivered by the plaintiff in the terms permitted by the order, on the 22nd December, 1900, and on the 29th December, 1900, being within four days of the date of the delivery of the reply (excluding Christmas vacation), no joinder of issue having been delivered, the plaintiff served notice of trial.

The defendants appealed from the order of the Master allowing the delivery of the reply, and also moved to set aside the notice of trial.

The appeal and motion were heard by MEREDITH, C.J.C.P., in Chambers, on the 30th December, 1902.

J. H. Moss, for the defendants, contended that the reply set up nothing that was not already in issue, and was delivered for the purpose of giving notice for a jury; and that the notice of trial was irregular.

R. B. Beaumont, for the plaintiff, contended that the reply was necessary in order to properly raise the issue; that the delay was occasioned by the defendants' refusal to produce the application signed by deceased on which they founded their defence until after the regular time for reply had expired; and that the defendants might deliver a joinder in vacation: *Thompson v. Howson* (1895), 16 P.R. 378.

Judgment was delivered at the close of the argument.

MEREDITH, C.J.:—I do not think I should interfere with the discretion which the Master in Chambers has exercised of allowing the plaintiff to deliver a reply. It may be that the reply is somewhat open to the objection taken to it by Mr. Moss, that all that it seeks to put in issue was already in issue by the statement of defence; but the purpose of it was to enable the plaintiff to file a jury notice, and I think it is a case in which the plaintiff should have that right.

The issue is as to fraudulent statements alleged to have been made by the insured vitiating the beneficiary certificate, and the question to be tried apparently is, whether those statements, if untrue, were wilfully and intentionally—fraudulently—made to the defendants.

Some Judges may think that a case which should be tried by a jury, and would not exercise the discretion of striking out the jury notice and trying it without a jury. What I am doing will leave it quite open to the Judge at the trial to exercise his discretion and try the case without a jury if he thinks it ought to be so tried.

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With regard to the other matter, I think Rules 257 and 258 * make it reasonably clear that Mr. Moss's contention is right.

The reply which was delivered could have been delivered without leave if it had been delivered within the time prescribed by the Rules. As I understand Rule 257, read in connection with Rule 262, which provides that the pleadings are to be deemed to be closed as soon as either party has joined issue, simply, it is clear, I think, that the defendants had four days within which, if they chose, to file a joinder of issue, or, if they found it necessary to do so, to apply for leave to deliver a further pleading; they had, however, in any case, the right to file a joinder of issue within the four days.

The pleadings were not, I think, therefore, closed until the lapse of the four days, or until they had joined issue, and notice of trial, having been given before the lapse of that time, and without a joinder of issue having been delivered, was irregularly given.†

I have no power, I think, to allow the notice of trial to stand; that would be in effect, I think, to disregard the cases which hold that there is no power to abridge the time allowed the defendant unless he is in such a position that terms may be imposed upon him.‡

I think therefore that Mr. Moss's appeal must be dismissed, and that his motion to set aside the notice of trial must be granted.

The costs of both motions will be in the cause to the successful party.

*257. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge thinks fit.

258. Subject to Rule 257, every pleading subsequent to reply shall be delivered within 4 days after the delivery of the previous pleading, unless the time is extended by the Court or a Judge.

†Rule 530 provides that "after the close of the pleadings either party may give notice of trial."

‡See *Hamilton Provident and Loan Society v. McKim* (1889), 13 P.R. 125; *Whitney v. Stark* (1889), *ib.* 129.

[BRITTON, J.]

GROSSMAN ET AL. V. CANADA CYCLE CO.

1902

Dec. 29.

Copyright—Infringement—Newspaper—"First Publication."

A newspaper printed and issued at a place in the United States, copies of which are deposited in the post office there addressed to subscribers both in that country and England, cannot be considered to be first published, or even simultaneously published, in England, so as to come within the provisions of the Imperial Act 5 & 6 Vict. ch. 45 requiring first publication in the United Kingdom to entitle the publishers to British copyright.

THIS action was tried at Toronto on the 16th September, 1902, before BRITTON, J., without a jury. The facts appear in the judgment.

C. D. Scott, for the plaintiffs.

E. B. Ryckman and *C. W. Kerr*, for the defendants.

December 29. BRITTON, J.:—The action is for the infringement of the alleged copyright of the plaintiffs in a journal called the "Cycling Gazette," and in an article entitled "The Booster's Club" published in that gazette.

The article was written for the plaintiffs by one Charles W. Mears, was paid for by the plaintiffs, and was published by them at Cleveland, Ohio, in the issue of the "Cycling Gazette" dated the 18th October, 1900, and on the first page of that issue was printed the following notice: "Copyright applied for, 1900, by Emil Grossman & Bro. All rights reserved."

The plaintiffs claim copyright, and say that on the 29th August, 1901, their copyright in the "Cycling Gazette," and in its issue of 18th October, 1900, and in this article intituled "The Booster's Club," was duly registered at Stationers' Hall, pursuant to the Imperial Act 5 & 6 Vict. ch. 45. This registration was for the purpose of bringing the present action, as required by sec. 24 of the last mentioned Act. At the time of registration the "Cycling Gazette" was published at New York.

The defendants published the article in question on the 23rd March, 1901, at Toronto, in a paper called "The Assistant Manager"—a paper not issued regularly but only to the trade and to agents in England.

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The defendants deny the registration of the alleged copyright, deny that the article is subject to copyright as against the defendants, and say that, as the plaintiffs are not British subjects, and as they reside outside the British dominions, the Imperial Act 5 & 6 Vict. ch. 45 does not confer any copyright upon the plaintiffs as alleged.

The defendants further say that this paper, "The Assistant Manager," was issued gratis; and that in good faith this article was published therein; and that its publication ceased in the spring of 1901; that the plaintiffs sustained no damage by the defendants' publication, but to cover any technical infringement, if any, and without admitting any liability, they pay into Court \$1.

Upon the evidence it is difficult to see that the plaintiffs have sustained any damage by reason of what is complained of, and, as the action is wholly for damages, it might be disposed of without considering whether the plaintiffs have copyright as alleged or not, or whether there has been infringement, so as to give the plaintiffs a right of action.

If this journal of plaintiffs comes under the definition of "book" as given in 5 & 6 Vict. ch. 45, sec. 2, then the plaintiffs are out of Court, because of the enactment of 7 & 8 Vict. ch. 12, secs. 19 and 20, which Act restricts copyright in any book "first published out of Her Majesty's dominions" to such right as a person may have become entitled to under this last mentioned Act.

The plaintiffs have brought their action on the assumption that 7 & 8 Vict. ch. 12 does not apply, and they seek to recover under 5 & 6 Vict. ch. 45.

The "Cycling Gazette" is within the wording of secs. 18 and 19 of the last mentioned Act. It has been held that sec. 24 does not apply to cases within secs. 18 and 19, so any objection to form or particulars of registration at Stationers' Hall is not open to defendants: see *Mayhew v. Maxwell* (1860) 1 J. & H. 312; *Cox v. Land and Water Journal Co.* (1869), L.R. 9 Eq. 324.

If sec. 24 does not apply to cases within secs. 18 and 19, then sec. 16 does not, so the statement of defence is sufficient

to let in any matter of defence disclosed by the evidence : see *Coote v. Judd* (1883), 23 Ch. D. 727.

To entitle plaintiffs to British copyright, there must be first publication of the paper containing the article in question in the United Kingdom.

This the plaintiffs have failed to establish. It is not in dispute that the "Gazette" containing the article was actually printed and published in Cleveland, Ohio, on the 18th October, 1900.

The only publication by plaintiffs in the United Kingdom was by posting numbers to subscribers in England, and particularly by posting a certain number of copies to W. H. Boffey, the agent of plaintiffs, whose address is given as 44 Fleet street, London, E.C., and he is described in the registration as first publisher.

It is contended by plaintiffs that the publication at Cleveland, in the United States, and at London, England, was simultaneous, because publication must be considered to date from the time of depositing the numbers of the "Gazette" in the post office at Cleveland.

Even if it be assumed that Mr. Boffey and the others in England received the "Gazette" in due course by post, subscribers in the United States would be in possession of their copies days in advance. This is not at all a question of how far, as a matter of contract or for any purpose, the post office department of either country can be considered agent for the persons to whom papers are addressed ; it is purely a question of "first publication in England," or, at least, simultaneous publication in England and the United States ; and I am of opinion that a paper printed and published in the United States, and mailed there to subscribers both in that country and England, cannot be considered to be first published in England.

Judgment for the defendants.

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RE SOUTH OXFORD PROVINCIAL ELECTION.

Jan. 2.

McKAY V. SUTHERLAND.

Parliamentary Elections—Controverted Election—Appeal—Settlement of Case.

No machinery has been provided by the Ontario Controverted Elections Act or by the Rules for the settlement of a case upon an appeal to the Court of Appeal from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court.

Semble, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal.

THE Judges who tried a petition under the Ontario Controverted Elections Act having disagreed, the case was remitted to the Court of Appeal.

S. H. Blake, K.C., and *Eric N. Armour*, for the respondent, moved before the Judges (STREET and BRITTON, JJ.) on the 31st December, 1902, for a direction as to what evidence was to be included in the case for the Court of Appeal.

G. H. Watson, K.C., for the petitioner.

January 2. STREET, J.:—No machinery has been provided either by the Act or Rules for the settlement of a case upon an election appeal.

The result, therefore, appears to be that either party is entitled to treat the whole evidence as being before the Court of Appeal so far as it bears upon the subject matter of the appeal; and either party may ask the Court of Appeal to look at any part of the evidence taken at the trial of the petition, which he may consider relevant to the appeal.

BRITTON, J.:—I agree that no machinery has been provided either by the Act or Rules for the settlement of a case upon an election appeal. That being the case, the trial Judges, after having given their decision and made their report, have no jurisdiction to act further, and they can not give any direction as to what part of the evidence given at the trial should be submitted to the Court of Appeal.

T. T. R.

[IN THE COURT OF APPEAL.]

McCLURE v. TOWNSHIP OF BROOKE.

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C. A.

1902

Dec. 24.

Drainage Referee—Official Referee—Reference—Statutes.

The Drainage Referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee.

Provisions of the Judicature, Arbitration, and Drainage Acts, discussed.
Decision of a Divisional Court, 4 O.L.R. 97, reversed.

APPEAL by the defendants from the decision of a Divisional Court, 4 O.L.R. 97, reversing an order of Meredith, C.J.C.P., and referring these actions for trial to the Drainage Referee. The Divisional Court held that the Drainage Referee was an official referee.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 10th December, 1902.

J. H. Moss, for the appellants.

G. H. Watson, K.C., and *N. Sinclair*, for the plaintiffs.

December 24. The judgment of the Court was delivered by OSLER, J.A.:—The statements of claim set forth certain demands which are the subject of proceedings before the Drainage Referee alone under the Municipal Drainage Act, and in no other jurisdiction. Combined with these are demands and causes of action over which, *quâ* Drainage Referee, he has no jurisdiction, and which are properly the subject of a suit or action at law. After actions brought, the plaintiffs, as it is said, took the proper steps to bring the former before the Drainage Referee in the manner prescribed by the Act, and then moved for an order to refer all the matters arising in the actions to the Drainage Referee, as an official referee, under sec. 29 of the Arbitration Act.

The learned Chief Justice of the Common Pleas directed that all the proceedings in the action should be stayed until the trial or other final disposition of the proceedings before the

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Drainage Referee, and, being of the opinion that the Drainage Referee was not an official referee within the meaning of the Act, and the defendants declining to consent to the reference to him as special referee, dismissed the application so far as a reference was sought by it. On appeal to a Divisional Court (King's Bench Division) the order was rescinded, and the actions were referred for trial to "J. B. Rankin, Esquire, Drainage Referee." Leave to appeal from these orders having been given (4 O.L.R. 102), the defendants now seek to reverse them and to restore the order of the Chief Justice of the Common Pleas.

Judges of the County Court and certain specified officers of the Supreme Court of Judicature and the High Court are by sec. 141 (1) of the Judicature Act, R.S.O. 1897, ch. 51, declared to be official referees for the trial of such questions as shall be directed to be tried by such referees.

The Drainage Referee is not one of these officers.

If other and additional official referees are required, and the President of the High Court so certifies, "the Lieutenant-Governor from time to time may appoint other and additional referees accordingly:" sec. 141 (2).

The Drainage Referee has not been appointed an official referee under this clause.

A person, therefore, who is not an official referee *ex officio*, i.e., by virtue of and as incidental to the holding of some other office, can become such only by special appointment as official referee, and the only authority for making such appointment seems to be under sec. 141 (2).

By the Arbitration Act, R.S.O. 1897, ch. 62, sec. 28, subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter for inquiry and report to any official referee or to a special referee agreed upon by the parties.

And by sec. 29 in certain specified cases the Court or Judge may refer the whole cause or matter or any question or issue of fact arising therein or any question of account to be tried before a special referee agreed on by the parties, or before an official referee.

The reference, therefore, can be made only to a person who is such an officer, or by consent to a special referee agreed on by the parties.

By sec. 88 (1) of the Ontario Drainage Act, R.S.O. ch. 226, the Lieutenant-Governor in Council may from time to time appoint a Referee for the purpose of the drainage laws.

The person so appointed shall be deemed to be an officer of the High Court: sec. 88 (2): and he shall hold office by the same tenure as an official referee under the Judicature Act: sec. 88 (4).

The Drainage Referee, therefore, while an officer of the High Court and holding his office by the same tenure as an official referee, is an officer specially appointed for the administration of the drainage laws, and his powers as drainage referee are specified and defined in sec. 89, *inter alia*, sub-sec. (1):— He shall have the powers of an official referee under the Judicature and Arbitration Acts and of arbitrator under any former enactments relating to drainage works, and he is substituted for such arbitrator.

If, however, he is not one of those officers who is *ex officio* an official referee under sec. 141 (1) of the Judicature Act, and has not been appointed as such by the Lieutenant-Governor under sec. 141 (2), I do not see how he can be regarded as an official referee under that Act merely because he happens to be a different kind of referee and officer of the High Court under another Act, with special powers incidental to the exercise of his jurisdiction under that Act. Rule 12 of the Judicature Act, referred to in the judgment below, which provides that all officers of the High Court shall be auxiliary to one another for the purpose of promoting the convenient and speedy administration of business, does not seem to me to advance the argument in favour of the Drainage Referee being an official referee, because, whatever may be his powers as Drainage Referee, for the purpose of the Drainage Act, the sole question is whether he is an official referee within the meaning of the Judicature Act and Arbitration Act, to whom references may be made *in invitum* under the latter Act. I cannot agree with the Court below in holding that "an official referee is official only in the sense of being an officer of the Court." He

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is an official referee by virtue of an appointment to that office, or *ex officio* as being the holder of another specified office. All official referees are officers of the Court, but it does not follow that all referees who are officers of the Court are official referees. If it did, a special referee would, by virtue of sec. 30 (1) of the Arbitration Act, be an official referee.

Section 8, sub-sec. 22, of the Interpretation Act, R.S.O. 1897, ch. 1, is also relied upon in the judgment below. I do not think it necessary to quote it, but it can have no application unless the Drainage Referee is *ex officio* or by appointment an official referee.

Then it is said that sec. 110 of the Drainage Act assumes that the Drainage Referee is an official referee to whom reference may be made under sec. 29 (b) of the Arbitration Act. The answer to that, again, is, that his status must be found in some appointment direct or *ex officio* as such. The section (110) is not one dealing with his jurisdiction, but with appeals from his decisions, and (if this part of it is still in force now that sec. 94 of the Act has been repealed by 1 Edw. VII. ch. 30, sec. 5) it may embrace the case of a decision or report of the Referee acting as special referee by consent of parties. It goes no further.

The jurisdiction of the Drainage Referee appears to me to be limited to the administration of proceedings under the Drainage Act. The powers conferred upon him are incident to that jurisdiction. The repeal of sec. 94 emphasizes this. As that section stood in the Revised Statutes, there was express authority to refer just such a case as this to him. If, as I think, he is not an official referee, that power no longer exists. I am therefore of opinion that the order of the Divisional Court is wrong and ought to be reversed and the judgment of Meredith, C.J., restored. Costs follow.

T. T. R.

[GARROW, J.A.]

RE VOTERS' LISTS OF HUNGERFORD.

1903

Jan. 2.

Parliamentary Elections—Voters' Lists—Notice of Appeal—Leaving at Clerk's Residence.

The language of R.S.O. 1897, ch. 7, sec. 17, sub-sec. 1, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc., means, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time allowed by the statute.

And where, between 9 and 10 o'clock of the evening of the last day for serving notices of appeal, certain notices were left on the outside knob of one of two doors of the clerk's dwelling house, by a person who first knocked but received no response, and such notices did not come to the knowledge of the clerk till about noon the next day, the service was held insufficient.

CASE stated under sec. 38 of The Ontario Voters' Lists Act by the Judge of the county court of Hastings.

The following were the facts. One Michael Quinn at between 9 and 10 o'clock of the evening of the 10th November, 1902, the last day for serving notices on the clerk of the township of Hungerford of appeals against the voters' list, went to the clerk's residence, knocked at the door, and, not receiving any response, opened a wire screen door and placed the notices on the outside knob of a house door, and, having closed the screen door, went away, leaving the notices there. The said door was on the west side of the house, and was not used as frequently as the door on the east side. The following day, about noon, a member of the family discovered the notices, and brought them to the clerk, who was then in the said dwelling, and who then for the first time learned of the appeals.

The following questions were submitted :

1. Were such appeals served in time on the clerk ?
2. Should they be acted on ?

The case was heard by GARROW, J.A., on the 2nd January, 1903.

No counsel appeared to support the service, but W. B. Northrup, K.C., was heard opposing it.

Garrow, J.A.

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January 2. GARROW, J. A. (after stating the facts as above):—In my opinion, the service was legally insufficient, and both questions should therefore be answered in the negative.

The language of the statute R.S.O. 1897, ch. 7, sec. 17, subsec. 1, is “give to the clerk or leave for him at his residence or place of business” notice in writing, etc. This must mean, I think, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time. The case saves consideration of what we might have presumed if all that appeared had been simply the placing of the notices between the two doors, because it states distinctly that the clerk did not become aware of the notices until the next day, or a day too late. What actually happened is, I think, what might reasonably have been expected to happen under such circumstances, and I therefore think the service was wholly insufficient. See *Watson v. Pitt* (1848), 5 C. B. 77, a decision under a statute containing somewhat similar language.

T. T. R.

[IN CHAMBERS.]

REX v. HAYWARD.

1902

Dec. 12.

Criminal Law—Theft—Offender Over 17 Years of Age—Commitment for Two Years to the Reformatory—Transfer to Central Prison on Two Years' Sentence—Petty Offence—Six Months' Sentence—Criminal Code, sections 752, 783, 785, 787, 955—R.S.C. 1886, ch. 183, sections 19, 25.

The defendant, a youth of over 17 years of age, was charged before a magistrate with stealing eighty cents out of the contribution box of a church. The magistrate's return shewed that he pleaded guilty and was committed for two years to the provincial reformatory. He was taken to the reformatory and sent on to the central prison and kept there in custody under the warrant of commitment to the reformatory.

On a motion for his discharge on the return of a *habeas corpus* :—

Held, that there had been a miscarriage of legal directions in sending a lad of over 17 years of age to the reformatory and in sending him on a sentence of two years to the central prison.

Held, also, that section 785 of the Code is intended to comprehend summary trial "in certain other cases" than those enumerated in section 783, and that when the offence is charged and in reality falls under section 783 (a) it is to be treated as a comparatively petty offence with the extreme limit of incarceration fixed at six months under section 787.

Held, also, that under the circumstances this was not a case for further detention or the direction of further proceedings under section 752, and an order for the defendant's discharge was granted.

THIS was a motion for the discharge from custody, on the return of a writ of *habeas corpus*, of one Robert Hayward, a prisoner in the central prison, under the circumstances set out in the judgment.

The motion was argued in Chambers on the 8th of December, 1902, before BOYD, C.

E. E. A. DuVernet, and *G. J. Smith*, for the motion.

Frank Ford, for the Attorney-General.

December 12. BOYD, C.:—The information and complaint is against the defendant for stealing eighty cents out of the contribution box in the Congregational church at Paris.

According to the return made by the magistrate he pleaded guilty and was committed for the term of two years to the provincial reformatory.

It appears that the police magistrate was informed that the defendant was over seventeen years of age, and that is now sworn to.

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When taken to the reformatory he was received there, only to be sent on to the central prison. The defendant is now in custody in the central prison under the warrant of commitment to the reformatory.

It is said that being over sixteen years of age he was not received by the superintendent of the reformatory, and was in some informal way turned over to the warden of the central prison.

The reformatory is recognized by the Dominion Government as a proper place of criminal custody for boys under the age of sixteen years (R.S.C. 1886, ch. 183, sec. 25).

It has not been pointed out to me what provisions were made for the dealing with youths over sixteen years of age committed to the reformatory by the magistrate under the erroneous opinion that he does not exceed sixteen years, in order that they may be placed in proper custody.

Here there has been a miscarriage of legal directions, first in sending a lad over seventeen years to the reformatory, and next in sending him on a sentence of two years to the central prison.

The sentence for a term of years not less than two is to the penitentiary; only to the central prison if less than two years: Crim. Code, sec. 955; R.S.C. 1886, ch. 183, sec. 19.

Upon the papers before me, there appears to be no legal authority to authorize the warden of the central prison to receive or retain this defendant.

Is it a case for further detention or for the direction of further proceedings under section 752 of the Code in regard to one who is no doubt guilty of the offence charged?

This leads one to consider the facts, which brings the whole proceeding under the authority of *Regina v. Randolph* (1900), 32 O.R. 212.

The offence charged was stealing a small sum of money, much less than ten dollars, and so it falls to be dealt with under section 783 of the Code.

It was argued that it might be regarded as coming under section 785, and so the sentence of two years' imprisonment be justified. But I think the correct reading of that section is suggested by the gloss in the margin, that it is intended to

comprehend summary trial "in certain *other* cases" than those enumerated specifically in section 783. Where the offence is charged and in reality falls under section 783 (*a*), it is to be treated as a comparatively petty offence, with the extreme limit of incarceration fixed at six months: section 787.

The defendant has been imprisoned since the 2nd of October, and is not now in lawful custody. As a first offender, he has perhaps been sufficiently convinced that it is not advisable to depart from the paths of honesty, and in hope that he may not again offend I now order his discharge.

The usual term of "no action to be brought against any one" is imposed as a condition of this discharge.

G. A. B.

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[BOYD, C.]

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LEDUC V. BOOTH.

Dec. 9.

Will—Devise—Use of House and Allowance—Care in Institution in the Alternative—Exercise of Judgment—Reasonableness.

A testator by his will gave the defendant all his estate on condition . . . that he pay the plaintiff \$50 a month and that she have the use of his house and furniture for her life; and by a codicil provided that if the defendant in his own absolute judgment was of opinion, that it would be best for her to be cared for in some institution, he should have the right and authority to place her there, and that if the institution was one carried on under defendant's direction, then the removal was to be with her consent, and that the charges for caring for her there should take the place of the use of the house and furniture and the monthly allowance.

Defendant chose an institution which was not under his own direction and where she would be a paying inmate and be cared for, but the plaintiff refused to leave the house and defendant ceased paying the monthly allowance, and plaintiff brought action for the arrears of the allowance and for the construction of the will :—

Held, that the will indicated that the condition of the plaintiff was one that needed care and oversight; that in 1901 the defendant came to the conclusion and made it known to her, that it would be for her welfare to give up housekeeping and take the benefit left to be brought into effect by his absolute judgment; that he had the right and authority to place her, as he had decided to do, in a sufficiently adequate home without her consent, and that the choice he had made was such a one, and he was entitled to possession of the house and to cease paying the monthly allowance.

THIS was a motion for judgment on the pleadings in an action brought for the construction of the will of one James Eves, deceased, and for arrears of an annuity payable thereunder to the plaintiff.

The material provisions of the will were as follows:—"I give, devise and bequeath all my real and personal estate to William Booth, Esquire, of No. 101 Queen Victoria Street, in the city of London, England, to hold to him and his assigns for ever on condition that he pay to my housekeeper, Mrs. Netty Leduc, fifty dollars per month, she also to have the use of the house where I now live . . . and also the use of all the furniture, premises, etc., free of rent and taxes, etc.; the fifty dollars to be paid to her each and every month for and after my decease during the term of her natural life or until she marries," etc.

By a codicil the testator provided :—

"I hereby vary my said will and testament as follows: If the said William Booth mentioned in my said will, in his own absolute judgment is of the opinion that it will be best for the said Mrs. Netty Leduc to be cared for in some institution or hospital where she may receive proper and necessary care, nursing, attention, and necessities for one in her condition, then the said William Booth shall have the right and authority to place her . . . in such a place, he to pay such charges as may be necessary for that purpose; and I further will and direct that the said William Booth may, with the consent of the said Mrs. Netty Leduc, remove her to one of the institutions carried on under his direction for the care of a person in her condition.

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And I further will and direct that in case the said Mrs. Netty Leduc shall be removed to such hospital or institution as hereinbefore mentioned, then the provisions in my said will as to the occupation and use of my said house . . . and the furniture, premises, etc., . . . shall cease and be void from that time forward, and the payment of the charges for caring for her . . . in such hospital or other institution shall be a substitute and instead of the payment of fifty dollars per month to her as mentioned in my said will, and I further will and direct that the payment of the said moneys for the benefit of or to the said Mrs. Netty Leduc shall not be a charge upon my said property real and personal."

The motion was argued in Court on the 9th of December, 1902, before BOYD, C.

It appeared that the defendant, who was general of the Salvation Army, was resident in England, and had caused inquiries to be made in Toronto by officials of that organization who reported to him, and acting on such reports he had decided that it was for the welfare of the plaintiff, who was a woman of about fifty-six years of age, that she should be removed to an institution, and had chosen an aged woman's home in the city of Toronto, called the Belmont Home, not in any way connected with the Salvation Army, where she would be a

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paying inmate at \$15 a month, and would be properly cared for, but that she declined to leave her house and enter the home. The defendant ceased to pay the fifty dollars a month at the end of the year 1901, and later in the month of November, 1902, he came to Canada, and while here saw the plaintiff in the house, and from inquiries then made and from what he saw, he decided that it was for the welfare of the plaintiff that she should become an inmate of an institution where she would be cared for.

J. E. Jones, for the plaintiff. The plaintiff is a beneficiary under the will to the extent of the use of the house and fifty dollars a month until the defendant has exercised "his own absolute judgment." It is no exercise of such judgment to act on the report of others, consequently the plaintiff is entitled to all the annuity up to the time when defendant personally visited her, even if not after. The plaintiff takes a life estate and the defendant a reversion: *Fulton v. Cummings* (1874), 34 U.C.R. 331. The defendant has no right or power over the person of the plaintiff, and there is no provision in the will for the case of her not being removed: she has not been removed, and does not intend to be removed. This is a condition subsequent, and it must be shewn to have happened strictly: *Hervey-Bathurst v. Stanley* (1876), 4 Ch. D. 251, at 272. No exact moment was fixed when the defeasance was to take place: *In re Viscount Exmouth, Viscount Exmouth v. Praed* (1883), 23 Ch. D. 158. I refer also to *Henning v. Maclean* (1901), 2 O.L.R. 169; affirmed in appeal, 4 O.L.R. 666.

A. Hoskin, K. C., for the defendant. Both parties are volunteers. There is no relationship between the testator and either beneficiary. The gift to the defendant is absolute, and is a vested estate in fee simple. The devise is not a charge on the property. The estate in fee in the house may be subject to a condition which may be in the nature of a trust: *Williams on Executors*, 9th ed., pp. 1124, 1125. As soon as the defendant exercised his judgment the plaintiff's right ceased, and the only way in which he could exercise it, while resident in England, was on the reports of others. The testator was aware of his residence there, and so described him in his will: *Re Ratcliffe*,

[1892] 1 Ch. 227. There is no difference between a condition subsequent and a condition precedent: *Hodgson v. Halford* (1879), 11 Ch. D. 959. A conditional bequest was intended. The fact that there is no gift over will not prevent a condition taking effect: *Ex parte Mary Eleanor Dickson* (1850), 1 Sim. N.S. 37, at p. 46; *Re Catts' Trusts* (1864), 2 H. & M. 46, at p. 52. See also *Tattersall v. Howell* (1816), 2 Mer. 26; *Clark v. Keefer* (1898), 29 O.R. 557, per Ferguson, J., at p. 562; *Costabadie v. Costabadie* (1847), 6 Ha. 410; *French v. Davidson* (1818), 3 Mad. 396; *Tabor v. Brooks* (1878), 10 Ch. D. 273; *In re Brittlebank*, *Coates v. Brittlebank* (1881), 30 W. R. 99, at p. 100. The evidence shews that the estate is not sufficient to pay the fifty dollars a month for any length of time, but will be sufficient to pay the plaintiff a reasonable sum for spending money and her maintenance in the home, where she will be well taken care of.

Jones, in reply.

December 9. BOYD, C.:—Cases do not afford much light as to the effect of this will. It must be construed by its own light, and the will and codicil are to be read together.

The testator while giving a life estate to the plaintiff in the Charles street house, coupled with a monthly payment of \$50, yet by the codicil varies that, if in the opinion of the defendant it will be best for the plaintiff to be cared for in some institution or hospital where she may receive proper and necessary care, nursing, attention and necessaries for one in *her condition*.

This will in 1896 indicates that the condition of the plaintiff was one that needed care and oversight from her mental and physical imperfections.

In August, 1901, the defendant came to the conclusion, and made it known to the plaintiff, that it would be for her welfare to give up keeping house and take the benefit instead contemplated by the will, and left to be brought into effect by the absolute judgment of the defendant.

He was to have the right and authority to place her in a suitable institution, with this limitation that if he chose one which was carried on under his direction (*i.e.*, as part of the

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organization of the Salvation Army), then the removal of the plaintiff was to be with her consent.

I do not read the will as providing for the plaintiff's consent if the defendant selected an independent and sufficiently adequate home for ailing or infirm persons.

This he had done by selecting Belmont Home, and he is willing that the plaintiff should take any other place of like nature and not too expensive, if she prefers it.

In the result, the defendant is entitled to the possession of the house on Charles Street and to cease paying the \$50 per month. As he made known his determination in August, 1901, and kept on paying after that the full amount of \$50 to December, 1901, and since that a reduced amount of \$17, I do not think he should be charged with any further sum in this action.

In strictness the plaintiff should have vacated the house last year, and though the payment is directed to cease from the time of her removal, that does not mean that she can wrongfully or in opposition to the defendant refuse when he has acted in accordance with the provisions of the will in providing for her elsewhere.

The defendant further offers to allow her monthly a sum of \$15 to cover all outlay for clothing, pocket money and all other necessities for her personal comfort, in addition to paying the expense of her being kept at a suitable home, apart from those under his direction.

He also agrees to pay the expenses of litigation. I think the judgment should be in these terms.

G. A. B.

[DIVISIONAL COURT.]

BEAUDRY v. GALLIEN.

D. C.

1902

Dec. 6.

Practice—Argument of Counsel—Misunderstanding.

In a proceeding before a local Master in a mechanic's lien matter an understanding was arrived at between counsel for the plaintiff and defendant and was verbally communicated to the Master. When the time arrived to act on the understanding counsel disagreed in their recollection of what the understanding was :—

Held, that a decision given by the Master, whose recollection of the understanding was the same as that of the plaintiff's counsel, in favour of the plaintiff, must be reopened and the matter referred back as the parties were not *ad idem*.

Wilding v. Sanderson, [1897] 2 Ch. 534, specially referred to.

THIS was an appeal by the defendants from the decision of the Master at Ottawa in a mechanics' lien proceeding tried before him, finding the sum of \$1,956 due from the defendants to the plaintiff.

The appeal, which was caused by a misunderstanding between the counsel for the plaintiff and defendants as to what had taken place before the Master, and which more fully appears in the judgment of STREET, J., was argued on the 10th of September, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J.

George F. Henderson, for the appeal, stated that his recollection was distinct that all that was agreed to was that the experts should only find the value of the items in dispute, and that all questions of law and liability for the different items should be discussed and passed upon by the Master. He referred to *Neale v. Lady Gordon Lennox* [1902] 1 K.B. 838; *Hickman v. Berens*, [1895] 2 Ch. 638; *Wilding v. Sanderson*, [1897] 2 Ch. 534; *Holt v. Jesse* (1876), 3 Ch. D. 177, at p. 184; *Lewis's v. Lewis* (1890), 45 Ch. D. 281.

J. A. Ritchie, *contra*, asserted that his recollection was that it was agreed that the experts should value the items and in that manner find the amount due by the defendants to the plaintiff, and for that amount judgment was to be entered by the Master, reserving the question of costs

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only, and that as the Master's recollection was the same, his view of the agreement should prevail; that as the agreement was arrived at in open Court before the Master, it was competent for the Master to do as he did in entering judgment in favour of the plaintiff, and referred to *Corry v. Lemoine* (1899), 18 P.R. 482.

Henderson, in reply.

December 6. STREET, J.:—The questions between the parties in this case involved the examination and determination of the amounts payable by the defendants to the plaintiff in respect of a great number of items, some large and some small.

The parties, their counsel and their witnesses, were before the Master at Ottawa for the purpose of trying these questions, when it was arranged that two experts, named Shaw and White, should go over the accounts in the interests of both parties.

What the parties agreed to do as the result of the conclusions at which these men should arrive is the question now before us.

The plaintiff's counsel states as his understanding of it that Shaw and White were finally to determine the amount due from the defendants to the plaintiff upon an examination of the accounts with the contract drawings and specifications, etc., and that the Master was to enter judgment for the amount so found.

The defendants' counsel states as his understanding of it that Shaw and White were merely to ascertain the amount properly payable in respect of each separate item, leaving it open to the defendants to dispute their liability to pay the amount of any or all of the items of the account.

The arrangement, whatever it was, was entirely verbal, and having been arrived at, as both counsel supposed, they went before the Master and stated it to him verbally. No note of it in writing was taken either by the Master or the counsel.

The experts, Shaw and White, brought in a report finding a lump sum of \$1,956 due by the defendants to the plaintiff, and gave no items: the defendants' counsel refused to treat this as in any way binding upon him, but the Master being

guided by his own recollection and understanding of what counsel had stated to him as the arrangement between them, has held the defendants bound by the finding of Shaw and White as a finding against them both of law and fact, and has entered judgment for that sum.

I do not see how we can, under the circumstances, avoid accepting Mr. Henderson's statement that he never agreed to the arrangement which the Master has found to have been the one stated to him by counsel.

No doubt the Master and Mr. Ritchie both understand the arrangement to have been that upon which the Master has acted; but I think we must come to the conclusion, upon Mr. Henderson's statement, that the parties were not *ad idem*: that they misunderstood one another, and that there was never any contract between them. This has been the finding even where minutes in writing have been signed by counsel under a misapprehension as to their effect: *Wilding v. Sanderson*, [1897] 2 Ch. 534, and cases there referred to.

I think the judgment should be set aside, and the matter referred back to the learned Master for trial unfettered by any finding of Shaw and White. There should be no costs of the appeal.

FALCONBRIDGE, C.J.: — I assent to this judgment with extreme reluctance.

The learned Master and the plaintiff's counsel are quite clear in their recollection of what the agreement was.

The result is most unfortunate, but is, I suppose, inevitable, unless we were to hold defendants' counsel guilty of bad faith in the matter.

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1902THE CORPORATION OF THE TOWN OF PALMERSTON AND
THE PALMERSTON PUBLIC LIBRARY BOARD.

Dec. 5.

Public Libraries—Aid by Municipality—Grant for Site—Validity of By-law—Assent of Electors.

A mechanics' institute having been converted into a public library and a board of management organized under Part II. of R.S.O. 1897, ch. 232, a grant of a sum of money for the purchase of a site was made by by-law of the corporation of the town in which the library was situate without the assent of the electors to either the appointment of the library board or to the grant:—

Held, that the power to grant aid to free libraries was absolutely in the hands of the local municipality under the general provisions of the Municipal Act, and that the by-law was valid notwithstanding section 18 of R.S.O. 1897, ch. 232, which might have its full and legitimate scope by being applied to the raising of ways and means by means of the requisitionary powers entrusted to the particular free libraries under sections 14 and 18 of the Act.

THIS was an appeal from the judgment of MacMahon, J., continuing to the trial an injunction granted by Britton, J., restraining the defendants, the corporation of the town of Palmerston, from, among other things, passing a certain by-law No. 254, authorizing a grant of \$650 to the defendants, the Palmerston public library board for the purchase of a site for a library building.

Upon the petition of the directors of the Mechanics' Institute, which up to that time carried on a public library in Palmerston, the council of the town, under R.S.O. 1897, ch. 232, sec. 16, on the 29th day of April, 1902, by by-law appointed a library board of management, and thereupon the defendants, the Palmerston public library board, was organized under Part II. of the said Act, but no by-law was submitted for the approval of the electors as provided for in Part I.

By said by-law 254 it was provided that the \$650 be raised during the year 1902 on all the ratable property of the town, and that the same be paid over not later than the 31st of December of that year, but the by-law was not submitted to the electors.

The defendants, the municipal corporation, appealed to the Divisional Court, and pending the hearing thereof the trial was proceeded with before Boyd, C., without a jury, at Guelph, on the 26th November, 1902, when evidence was taken, but any argument necessary was postponed until after the hearing of the appeal.

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The appeal was argued on the 2nd December, 1902, before a Divisional Court composed of BOYD, C., and MEREDITH, J.

John J. Drew, for the appeal. The old Mechanics' Institute was properly converted into a public library board, and that board was legally organized under Part II., of the Act, for which it was not necessary to have the approval of the electors, and was a proper object of the grant. The grant was made under sec. 591, sub-sec. 4, of R.S.O. 1897, ch. 223 (the Municipal Act), and did not purport to be otherwise than payable out of the general taxation of the year, although special provision was made for raising the amount. The by-law created a valid debt within the meaning of section 402, sub-sec. 1, of the Act: *McMaster v. The Corporation of Newmarket* (1861), 11 C.P. 398, and as it did not increase the aggregate rate for that year to more than two cents in the dollar, it was within the power of the council, without the approval of the electors or rate-payers, and was passed without reference to the Public Libraries Act. The restriction of section 18 of the latter Act is not applicable, the special rate named in that section being the special rate which the council must raise under section 14, sub-sec. 1. The formation of public libraries under Part I. of the Act is first approved of by the electors, and the municipal council must levy such special rate from year to year sufficient to furnish the amount estimated by such public library board: *Re Toronto Public School Board and City of Toronto* (1901), 2 O.L.R. 727. The restraint in section 18 is against the exaction of this special rate by boards organized under Part II. until the by-law is approved of by the electors. Section 18 ought not to apply, because it was passed in 1895, 58 Vict.; while said sub-sec. 4 of sec. 591 of the Municipal Act was in force before that time.

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J. Montgomery, for plaintiff, contra. The by-law in question creates a special rate. The Public Libraries Act is incorporated in the Municipal Act, R.S.O. 1897, ch. 232, sec. 8. The restraint of section 18 applies; the obvious intention of the Act being that the assent of the electors must be obtained before special expenditure is incurred either under Part I., where the vote is to be taken at the creation of the board, or under Part II., before the board created by the council is allowed to collect a special rate. The special provisions of section 18 restrict the general powers granted by the Municipal Act. The grants contemplated by section 591 of the Municipal Act are to be made out of the general funds of the municipality only when such are in hand. Section 591 is subject to provisions of sec. 389, sub-sec. 1, and the money in question is not required for ordinary expenditure: *The Edinburgh Life Assurance Co. v. The Municipality of the Town of St. Catharines* (1864), 10 Gr. 379, at p. 388.

J. H. Tennant, for the library board, contended that the board should not have been made a party to the action.

December 5. BOYD, C.:—Under the Municipal Act, Div. XXII., entitled “Aids, Bonuses, Loans and Bounties,” it is provided, sec. 591, sub-sec. 4, as to “free libraries,” that the councils of towns may pass by-laws for granting money or land in aid of any free library established under the Public Libraries Act, R.S.O. 1897, ch. 232, within the municipality.

By comparison with other subdivisions of that section, it appears that the by-law for such aid need not be assented to by the electors; such electoral assent is required in the case of aid to “Gas and Water Companies,” “Harbours, Wharfs, Beacons,” and “Road, Bridge and Harbour Companies,” and on the principle of *expressio unius*, etc., it is to be inferred that the power to grant aid to free libraries is absolutely in the hands of the local municipality.

The by-law attacked in this case may well be supported under that clause of the general Municipal Act, and I find nothing clearly derogating from that power in the special Act relating to these libraries: R.S.O. 1897, ch. 232.

The clause relied on by the plaintiff as limiting the power of the defendants to enact this by-law of their own motion is section 18 of the Public Libraries Act, ch. 232; which provides that no special rate shall be levied by any municipal council for the purposes of a public library, organized according to Part II. of the Act, until a by-law has first been approved by the electors, etc. The original of this section appears first in 1895 as 58 Vict. ch. 45, sec. 11 (4) (O.).

But before this, in 1892, is found the enactment, now sec. 591, sub-sec. 4 in the Municipal Act, providing for the granting money or land in aid of *any incorporated Mechanics' Institute* or free library established under the Free Libraries Act.

Indeed, this power dates back to the establishment of municipal government, and we find in 29 & 30 Vict. ch. 51, sec. 246 (4), that the local councils may grant money or land in aid of any incorporated Mechanics' Institute within the municipality.

Such an Institute was a private voluntary body incorporated under the Act relating to Mechanics' Institutes, and, without any need of popular vote, the local municipality might always benefit it by way of donation. That long established law should not be reduced by any ambiguous legislation such as that found in the section relied upon by the respondents. That section may have its full and legitimate scope by being applied to the raising of ways and means by means of the requisitory powers entrusted to the particular free libraries under sections 14 and 18 of the Act, ch. 232.

The \$650 granted by the by-law in this case is to be expended in the acquisition of a suitable site: instead of a grant of land for that purpose, the town grants an equivalent in money; that, perhaps, may not, fall within the purview of section 31 of ch. 232, but that section is *in pari materia* with the larger power of donation conferred by the Municipal Act, inasmuch as it leaves it open for the municipality to contribute as is deemed expedient to the maintenance of any public library, whether under Part II. or not, without popular vote. (Section 31 is classed under the head of "general provisions").

Sections 14 and 18 of ch. 232 are probably to be read together, and so the "special rate" is defined to be the "special annual rate" which is to be fixed upon the amount estimated

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by the library board as required to meet the yearly expenses necessary for carrying the Act into effect. But the distinction between that and the matter in hand is broadly that in the case of "special rate" the library board can enforce its demands upon the municipality subject to a popular vote, whereas in this instance the bestowment is one of bounty and grace on the part of the municipality.

There has been too much litigation over this by-law; there was no such definite judgment on the law by my brother MacMahon as called for a rehearing to decide what would properly be reserved till the trial of the action.

The injunction was only a discretionary safeguard to prevent money being levied till the cause was disposed of in due course; therefore, to do the best that can be done as to costs, the judgment of the Court will be to dismiss the action with one-half the costs of litigation to be paid by the plaintiff to the defendants, the municipality.

To the other defendants \$10 costs, to be paid by plaintiffs.

MEREDITH, J.:—It ought clearly to appear that power is given to a municipal council to make an extraordinary expenditure.

This expenditure is in aid of a free library established, under the Public Libraries Act, within the municipality, and is clearly authorized by section 591 of the Municipal Act, sub-sec. 4.

It is contended that this provision is restricted by section 389 of the latter Act; but that section is in restraint of borrowing, not, as in this case, of levying within the limit the law imposes, two cents in the dollar: see sec. 591, sub-secs. 6 and 8.

Section 14 of the Public Libraries Act is not intended to conflict with section 591 of the Municipal Act, but has regard to levies for the board of management as provided for in Part I. of the former Act: see section 31.

G. A. B.

[BRITTON, J.]

MAJOR V. MCGREGOR.

1902

Dec. 24.

Defamation—Libel—Words of Abuse—Natural Signification—Innuendo.

The defendant, a tax collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. should pay them. He subsequently wrote and mailed to the plaintiff a postal card stating "I saw J. S. this morning, he said make the S.B. pay it."

In an action for libel, in which plaintiff claimed that "S.B." applied to him and meant "son of a bitch":—

Held, that there was no reasonable evidence to go to the jury that the letters conveyed the meaning attributed to them by the plaintiff; they were words of abuse which, as often used, were absolutely meaningless and did not impute anything against the character of the plaintiff's mother and were not a statement of a fact of something obviously untrue; that in their natural signification they were not actionable, and that the plaintiff had failed to prove his innuendo.

THIS was an action for libel tried at Cornwall on the 25th of October, 1902, before BRITTON, J., with a jury.

The following facts are taken from the judgment.

The libel complained of is on a post card, addressed, as it is alleged, to the plaintiff, written and mailed by defendant.

The defendant is a tax-collector, and apparently applied to the plaintiff for taxes due upon land, owned, or occupied, by the plaintiff. The plaintiff told the defendant that "Jack Sullivan should pay these taxes." There is no evidence of what took place between the defendant and Sullivan, but the defendant wrote the post card complained of, which was as follows:—

"Mr. Major,

"Williamstown, 20th Aug., 1902.

"Dear Sir,

"I saw Jack Sullivan this morning, he said make the S.B. pay it. Sell him out, who else should pay it but him. So go ahead now I will be obliged to sell your goods in a few days if not settled, so you had better attend to it at once and save further trouble. I will send posters down this week. Copy 775.

"Yours truly,

"A. MACGREGOR.

"This is the last notice.

"Williamstown."

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This postal is addressed to Telesphore Major, Esq., South Lancaster, Ont.

It was brought from the post-office at South Lancaster by Blanchette Major, the father of the plaintiff. Blanchette Major does not speak English, and can neither read nor write. He handed the card to the plaintiff's wife, and she read it to Blanchette, but he says he did not pay any attention to it. No other person is called who ever saw, or read, or heard read the postal card. A witness is called who heard the defendant say, since the commencement of this action, that he did send a postal card to the plaintiff, and that the defendant then used in reference to the plaintiff the term of abuse which the plaintiff says was intended by the letters "S. B." on the card.

The postal card in question had not been seen by the witness, nor was it identified in the conversation, nor did the defendant say anything about what he intended by the letters "S. B."

The plaintiff says that the defendant by this card intended to state, and did state, that the plaintiff is a son of a bitch, and that is the libel complained of, and that the plaintiff has thereby been disgraced.

G. I. Gogo, for the plaintiff.

D. B. MacLennan, K.C., for the defendant.

December 24. BRITTON, J.:—At the close of the plaintiff's case, defendant's counsel moved for a nonsuit. I was inclined to withdraw the case from the jury, as I was of opinion that there was no reasonable evidence to go to the jury of the innuendo as laid by the plaintiff, but I thought it best to reserve my decision upon that motion, and in order to avoid the necessity of the parties coming down to trial again in any possible event, I allowed the case to go to the jury, and their verdict, if for the plaintiff, should be subject to the determination of the question of law. This course was adopted, following *Macdonald v. Mail Publishing Co.* (1900), 32 O.R. 163; (1901), 2 O.L.R. 278.

The jury found for the plaintiff and \$15 damages.

The motion for nonsuit was fully and ably argued, and notwithstanding that the questions under consideration involve first principles in the law of libel, after looking at all the cases cited, and some others, I give my decision with some hesitation.

The plaintiff limits his complaint to the defamatory sense which he has put upon the post card, and I confine my remarks to that sense.

I am of opinion that there was no reasonable evidence to go to the jury that the letters on the postal card conveyed to anyone the meaning in reference to the plaintiff, which the plaintiff attributes to them. It was argued that if the Judge determines (and it is for the Judge to determine) that these letters "S. B." are capable of the meaning attached to them by the plaintiff, then the question is wholly for the jury, and that they may find for the plaintiff without any further evidence. I confess to a little difficulty in coming to the conclusion that even if the words which plaintiff contends for were written at length, they would be libellous. In all of the many examples given in the works of Odgers, Starkie, Folkard and Townshend, I do not find these to have been the subject of decision in any litigation.

I am unwilling to go any further, than compelled by decided cases, in having an action of libel "made easy" for a person who has not really suffered either pecuniarily or in the estimation of others, by reason of what was written.

I doubt very much if the words, even if written out at length as in the plaintiff's innuendo, "would appreciably injure the reputation of another," or "would make one think worse of him." I doubt if these words would expose a person to "hatred, contempt, ridicule, or obloquy," or cause a person to be "shunned or avoided by his neighbours." They are words of abuse, but are, as often used, absolutely meaningless. No one understands them to really impute anything against the character of the mother, and they cannot be understood to be a statement as a fact of something obviously untrue. A person using such language is guilty of low abuse.

It may be, however, and I will so assume for the purposes of this trial, that the language, if written so as to mean what plaintiff says this means, may be such as to set persons of whom written in a scurrilous or ignominious light. It is that kind

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of reflection that creates bad blood and provokes personal retaliation; it may be that such written abuse is fairly calculated to injure a person "in the enjoyment of society, hold him up to scorn or throw a contempt upon him which might affect his general fortune or comfort." If so, these words written and published of a person would be libellous.

The card is addressed to *Telesphore Major*—the plaintiff's name is Zephraim Major. No one is called who saw the card except the plaintiff's father, and he can neither read nor write. It was given in evidence that the plaintiff's wife said she read it, but whether she did or not, and whether correctly or not, or with what understanding, does not appear.

There is no question of publication.

The case of *Robinson v. Jones* (1879), 4 L.R. Ir. 391, decides that a post card sent by mail is publication. The question here is, can the plaintiff, relying upon the fact of publication, accept the post card, determine for himself what the letters mean, and without evidence that any other person so understood them, have his case submitted to a jury? I do not think he can.

The plaintiff in this case does not complain of anything on this post card except that defendant applies to him the designation mentioned. There is no complaint that the defendant meant to injure plaintiff's credit, or that he described him as an untruthful person, or as a person whose goods would have to be sold in order to collect a debt. But the complaint is that defendant has used bad language by which plaintiff has been disgraced, and that the defendant, although requested to do so, had refused to apologize for his "disgraceful language."

I do not think the letters on this postal card in their natural signification are actionable, and the plaintiff has failed to prove his innuendo.

Even if the letters are reasonably capable of the meaning ascribed to them by the innuendo, and in that sense are actionable, I think it was necessary for the plaintiff to call evidence to shew that the words were in fact understood in that sense: Odgers, 3rd ed., 596, 597.

It is obvious that the letters, used in their natural sense, may mean any one of many things other than what is alleged

by the plaintiff: see *Macdonald v. The Mail Printing Co.*, 32 O.R., at pp. 168, 169. This part of the case was affirmed by Divisional Court, 2 O.L.R. 278. In *Huber v. Crookall* (1886), 10 O.R. 475; Chief Justice Wilson says at page 481, "It is also a rule that words not libellous must be read and construed in their natural sense, but they may be shewn to have a different meaning by evidence of a libellous purpose, or of extrinsic facts calculated to lead reasonable men to understand them in a libellous sense"; and see further on same page.

Here nothing was shewn as to the defendant's purpose other than is shewn by the card itself, and no one who read the card, if any one did read it, gives any evidence upon the subject.

At page 485 of the last cited case is the following: "As the writing is not libellous in its terms and according to its natural meaning, and as it can be made so only by the extrinsic facts and circumstances given in evidence, it must be shewn that the person or persons to whom it was published understood the writing not in its natural, but in a defamatory sense."

According to that case, the plaintiff would have been at liberty to ask any witness:

1. Did you read or understand these letters in the ordinary or natural sense?
2. Why did you not understand these letters in their ordinary or natural sense?
3. In what sense did you understand them?

It appears to me that the natural and ordinary sense in which this post card would be read would be that McGregor should make the "S. B.," referring to some person or company or society known to McGregor, pay, and that these letters would not necessarily or reasonably imply a description or designation of the plaintiff, such as plaintiff complains of. As to the initial letters, if the intention is doubtful, the opinion of witnesses who, from their knowledge of the parties and the circumstances, are able to form a conclusion as to the defendant's intention and application, are evidence for the information of the jury.

Place yourself in the position of the reader of the card, and determine the meaning of the language according to its natural and proper construction. I am bound to do that, and in so

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doing it seems to me, there is no reasonable evidence to go to the jury that these letters "S. B." mean what plaintiff complains of.

These letters are innocent in their primary and natural sense, and such as would not be read by any reasonable person as conveying a libellous imputation on the plaintiff. See *The Capital and Counties Bank Limited v. George Henty & Sons* (1888), 7 App. Cas. 741.

I was referred by plaintiff to *Cox v. Lee* (1869), L.R. 4 Ex. 284. In that case Kelly, C.B., says, "It is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by a jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance," p. 288; and also to *Hart v. Wall* (1877), 2 C.P.D. 146, in which Lord Coleridge says, "The question is not whether the letters are susceptible of an innocent interpretation, but whether no libellous construction can reasonably be put upon them; for if such construction can reasonably be given to them, it is for the jury to say whether or no that is the true interpretation of them."

My decision is not, in my view of it, against these eminent authorities, because I come to the conclusion, rightly or wrongly, that, upon the evidence in this case,

1. No libellous construction can reasonably be given to the letters.

2. These letters so written as upon the post card in question and without further evidence cannot be a libel.

I am of opinion, and so I direct, that judgment should be entered for the defendant dismissing the action, and with costs. If I am wrong in holding that the case should not be submitted to the jury, the plaintiff is entitled to recover \$15 damages, and costs.

G. A. B.

[DIVISIONAL COURT.]

McDONALD V. SULLIVAN.

D. C.

1902

Nov. 6.

Dec. 4.

Attachment of Debts—Rent—Payable under Lease to Administratrix for Benefit of Others.

Plaintiffs, claiming as heirs at law of their father and owners of a lot of land, brought an action for specific performance, which was dismissed with costs. After the trial one of the plaintiffs, G.R., died, and probate of his will was granted to a sister and co-plaintiff, and the action was revived in the names of the remaining plaintiffs and the executrix, and an appeal against the judgment was dismissed with costs.

It appeared G. R. owned one half of the lot and the father of the plaintiffs the other half, and that the lot had been leased to a tenant by one of the plaintiffs as administratrix of the father, who died in or before 1896, and by the executrix of G. R. No caution was registered under the Devolution of Estates Act :—

Held, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs.

Macaulay v. Rumball (1869), 19 C.P. 284, commented on.

Judgment of Street, J., reversed, and judgment of the Master in Chambers restored.

THIS was an appeal from an order of Street, J., reversing an order of the Master in Chambers.

The following facts are taken from the judgment of the Master :—

On the 16th of February, 1900, George Reilly, C. B. Reilly, Maud McIlmurray, Mary Sullivan, and Nan Reilly issued a writ against John McDonald, the judgment creditor herein, claiming specific performance of an agreement for the purchase of lot 13 in the 4th concession of the township of York. The plaintiffs claimed to be owners of the said lot as heirs at law of George Reilly, deceased.

The action, coming on for trial on the 24th of March, 1901, was by judgment delivered on the 24th of April, 1901, dismissed with costs to be paid by the plaintiffs to the defendant. These costs were taxed at the sum of \$209.49.

The plaintiff George Reilly died on the 1st day of April, 1901, and probate of his last will and testament was granted to his sister and co-plaintiff, Mary Sullivan, on the 23rd of September, 1901.

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By an order of revivor, dated the 26th day of September, 1901, the action was revived in the name of Mary Sullivan, executrix of the estate of George Reilly, deceased, C. B. Reilly, and Maud McIlmurray, Mary Sullivan and Nan Reilly, plaintiffs, and John McDonald, defendant, and the executions issued for the said costs were by order also amended in accordance with such order of revivor.

The plaintiffs appealed from the said judgment, and the appeal was dismissed on the 11th of March, 1902, with costs taxed at \$132.40.

The land in question was leased to a tenant by Nan Reilly as administratrix of her father, and by Mary Sullivan as executrix of her brother George Reilly, and the judgment creditor attached the rent and moved absolute the order for payment over before the Master in Chambers on the 3rd of November, 1902.

W. A. Skeans, for judgment creditor.

W. Norris, for judgment debtors.

David Smith, garnishee, in person.

November 6. THE MASTER IN CHAMBERS:— It appears that the plaintiff George Reilly in his lifetime owned the north half of the said lot, while the father of the other plaintiffs owned the south half of the lot.

The defendant McDonald, as judgment creditor of the plaintiffs, issued an order on the 27th of September, 1902, attaching certain rent due by the tenant of the said lot, and the matter coming on to be heard before me on the return of such attaching order, the tenant (garnishee) appeared and admitted owing \$155, which he was quite willing to pay as the Court might direct, less costs of appearance fixed at \$3.

For the judgment debtors, counsel contended that the rent was due not to the plaintiffs, against whom the judgment had been obtained, but to Nan Reilly, administratrix of her father's estate, and to Mary Sullivan as executrix of her brother's estate.

It appears that letters of administration to the estate of the father were issued to Nan Reilly, daughter, and one of the plaintiffs in the above action, sometime in 1896.

It is shewn that no caution was registered against the lands in question under the Devolution of Estates Act, so that the property vested in the heirs under section 13 of the Act, and this the plaintiffs in the action claimed by bringing the action in their own names instead of the names of the administratrix.

It is true that the administratrix pretended to enter into a lease of the property to the tenant (garnishee), but this she apparently did for the benefit of the heirs without any legal authority.

As to Mary Sullivan, the execution is already against her as executrix of her brother's estate, and his estate is entitled to a proportionate part of the rent in question.

The order will go for payment to the judgment creditor of the sum of \$152 in full of the rent due by the garnishee on the 1st of October, 1902. The judgment creditor will be entitled to his costs of this proceeding to be deducted from that sum.

From this judgment the judgment debtors appealed to a Judge in Chambers, and the appeal was argued on the 10th of November before Street, J., who allowed the appeal with costs on the ground that the rent under the lease was not payable to the judgment debtors but to Nan Reilly as administratrix of her deceased father.

From the latter judgment the judgment creditor appealed to a Divisional Court, and the appeal was argued on the 2nd of December, 1902, before BOYD, C., and MEREDITH, J.

Proudfoot, K.C., for the appeal, contended that the parties liable for the costs were entitled to the rent of the father's half lot, no caution under the Devolution of Estates Act having been registered, even although the lease was made by his administratrix; that the action had been revived in Mary Sullivan's name as executrix of her brother George Reilly, and that the execution against him should reach his share of the rent: that there was execution against all the parties entitled to the rent, which was attachable to pay their debt, citing *Page v. Way* (1840), 3 Beav. 20.

McBrady, K.C., contra, contended that Nan Reilly was still administratrix of the estate of George W. Reilly, and that

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the estate was not administered. That Mary Sullivan was executrix of the estate of George Reilly, and had three years within which to administer the estate, and might register a caution: that the property had not vested in the heirs at law: 2 Edw. VII., ch. 17, sec. 3. That the lease being made by Nan Reilly as administratrix and Mary Sullivan as executrix, the rent was payable to them in their representative character, and could not be attached to pay an individual liability: that none of the heirs could sue the tenant for their share of the rent without suing on behalf of all the heirs or making them parties to the suit, and that the shares were not ascertained: Williams on Executors, vol. 2, 7th ed., p. 2006; *Macaulay v. Rumball* (1869), 19 C.P. 284; Holmsted & Langton, 2nd ed., p. 1074.

Proudfoot, in reply, cited *In re Cowan's Estate*, *Rapier v. Wright* (1880), L.R. 14 Ch. D. 638; *Webb v. Stenton* (1883) 11 Q.B.D. 518, at p. 530; *Booth v. Trail* (1883), 12 Q.B.D. 8.

December 4. BOYD, C.:—The material facts are set forth in the Master's judgment. Though his order was reversed by my brother Street, it appears that the cases cited to us were not before him, nor are any reasons given for the order now in appeal.

It was argued that attachment could not issue against the administratrix and the executrix, and for that *Macaulay v. Rumball*, 19 C.P. 284, was cited.

The headnote of that case is so insufficient as to be misleading. What was decided was that a debt due to one in a representative character cannot be garnished to answer a debt owing by him in a private capacity, but a debt due to a dead judgment debtor may be attached as against his personal representative: *Stevens v. Phelps* (1875), L.R. 10 Ch. 417, and *Nash v. Pease* (1878), 47 L.J.Q.B. 766.

Here the debt was due by several judgment debtors, and the rent overdue garnished was payable to them as owners of the land under rent.

As to half the tenement, the south half, it was owned by George W. Reilly, the father of the judgment debtors, and it had descended to them on his death.

As to the other half, it was owned by George Reilly, his son, who died, pending the action, liable for the costs which form the debt in question, and his liability was taken up in the action by his executrix, Mary Sullivan.

The case is plain as to the liability of Mary Sullivan as executrix, and as to the others the intervention of the administratrix, who assumed to lease part of the land, is not material. For no caution was registered and no estate is in her, and while she might collect the rent it would only be for the beneficial use of the heirs.

The materials shew that there are no creditors of either estate who were affected by the garnishment, and I think it should work its full effect in this case, and that the Master's order should be restored. The costs of all the proceedings to go to the judgment creditors and be deducted out of the rent attached.

MEREDITH, J.:—As to the rents of the one-half lot, the judgment debtors are beneficially entitled to them.

The lease was made by the administratrix, but she had no legal or beneficial interest in the land. The rents when paid to her would be received by her for the debtors' benefit; they might recover them from her in an action for money payable to them for money received by her for their use.

All right and title to the land long since vested in them. The intestate's debts have been paid, and there is no reason why the land or rent should not go to the heirs at law. There, therefore, is no reason why the rents cannot be attached to answer the debts of the heirs at law.

As to the other half lot: the testator was one of the judgment debtors: the rents ought to go towards payment of his debts: if payable to him they would be attachable; payable to his legal personal representative, against whom the judgment has been revived, they are likewise attachable.

If the attachment would give the judgment creditor any undue advantage, the case would be one for administration of the estate. But that is not the case, there are no debts which will be postponed or otherwise prejudicially affected by giving effect to the garnishee order.

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I would set aside the order appealed against, and restore that of the Master in Chambers, with costs.

[Leave to appeal to the Court of Appeal was refused by Moss, C.J.O., on the 24th of December, 1902.]

G. A. B.

[DIVISIONAL COURT.]

D. C.
1902

May 15.
Dec. 2.

DAWDY
v.

THE HAMILTON, GRIMSBY AND BEAMSVILLE ELECTRIC R.W. CO.

Street Railways—Conductor's Authority—Evidence—Jury—New Trial.

Plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down but did not stop, and as it was passing the conductor seized plaintiff's hand and while attempting to help her on board signalled the car to go on again which it did and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently:—

Held, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it was slowing up; that the scope of a conductor's authority is one of evidence; that there was evidence to go to the jury, and that the effect of it was for them to consider, and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority. Judgment of Street, J., at the trial, reversed.

THIS was an appeal by the defendants from the judgment of Street, J., in an action for an injury received in boarding a car of the defendant company.

The facts sufficiently appear in the judgments.

The action was tried at Welland on 11th March, 1902, before Street, J., and a jury.

E. E. A. DuVernet, and *L. C. Raymond*, for defendants.
W. M. German, K.C., and *Geo. H. Pettit*, for plaintiff.

The jury, in answers to questions, found that the plaintiff's injury was caused by the conductor seizing her hand and

trying to pull her on the car, and that he acted negligently, and they assessed the damages at \$650.

The learned trial Judge reserved judgment on these findings, and subsequently dismissed the action with costs by the following judgment:—

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May 15. STREET, J.:—The plaintiff's story was that she was standing on the platform of the defendants' station signalling with her hand to one of their cars, which was coming on at a rapid rate, and which she wished to board.

As the car passed her she says that her hand was seized by the conductor of the car and she was lifted from the platform and carried bodily some ten feet, when the conductor let go of her and she then landed on her feet: that during this period she was struck on the breast by the handle-bar and injured.

She stated that she knew of the company's rule that persons were not permitted to get upon moving cars, and that she had not attempted, and did not attempt, to get upon the car in question until it had stopped: that she thought the conductor was committing an impudent act in seizing her hand, and that he had in fact committed an assault upon her in doing so.

The defendants called no witnesses, and the jury, in answer to questions, found that the injury to the plaintiff was caused by the conductor seizing her by the hand, causing her to strike on the end of the car: that he was trying to pull her on the car: that he acted negligently in doing so, and they assessed the damages at \$650.

I reserved judgment upon these findings, and have since considered the cases upon the points involved.

The findings must, of course, be read in connection with the evidence and charge.

If the plaintiff's story had been that she was trying to get upon a moving car, and that the conductor had taken hold of her to help her, and in doing so had dragged her along the platform and hurt her, her story would have been at all events an intelligible one, although it might have exposed her to the risk of a nonsuit upon the ground that it was her own act which led to her injury.

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This risk she avoided when she asserted that she was not making any attempt to get on the car when she was seized by the conductor. Both the witnesses called on her behalf supported her in this statement.

I overruled the defendants' motion for a nonsuit, and submitted to counsel the questions I proposed to ask the jury to answer. No objection was taken to their form, and none others were suggested.

The plaintiff says she was not attempting to get on the car: the jury say the conductor was trying to pull her on it, and that in doing so he acted negligently.

In endeavouring to pull on board a car a person who was merely standing on the platform and not attempting to get on board, the conductor was not acting within the scope of his duty as the servant of the company: *Coll v. Toronto Railway Co.* (1898), 25 A.R. 55, and the cases there cited.

The action therefore fails against the company, and should be dismissed with costs.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on the 1st December, 1902, before BOYD, C., and MEREDITH, J.

German, K.C., for the appeal, contended that the plaintiff was a passenger as soon as she got on the platform station: that the conductor was aiding her to get on the car, which was within the scope of his employment and authority, and that what was within the scope of his authority is a question for the jury, and should have been submitted to them, citing Addison on Torts, 6th ed., 107; *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526; *Bayley v. The Manchester, Sheffield, and Lincolnshire R.W. Co.* (1872), L.R. 7 C.P. 415, at p. 420, (1873), L.R. 8 C.P. 148; *Burns v. Poulson* (1873), L.R. 8 C.P. 563; *Moore v. The Metropolitan R.W. Co.* (1872), L.R. 8 Q.B. 36; *Beard v. London General Omnibus Co.*, [1900] 2 Q.B. 530.

Du Vernet, contra, contended that as the plaintiff knew the car was moving fast, and was aware of the rule against getting on a car while it was in motion, she should not have attempted to do so: that the conductor in seizing her was acting

outside the scope of his employment: and that a master is not liable for the act of a servant, even when in the interest of the master, if not within the scope of the servant's employment, referring to *Coll v. Toronto Railway Co.*, 25 A. R. 55, at pp. 62, 63, and 64; *Knight v. North Metropolitan Tramways Co.* (1898), 14 Times L.R. 286; *Emerson v. The Niagara Navigation Co.* (1883), 2 O.R. 528; *Poulton v. The London and South-Western R.W. Co.* (1867), L. R. 2 Q. B. 534, per Blackburn, J., at p. 539; *McManus v. Crickett* (1800), 1 East 106; Ringwood's Law of Torts, 3rd ed., 194; *Roe v. The Birkenhead, Lancashire and Cheshire Junction R.W. Co.* (1851), 7 Ex. 36.

German, in reply, cited *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270.

December 2. BOYD, C.:—Having read and considered this evidence, it does not seem to me that the case has been fully tried by the jury.

The question as to the scope of the conductor's authority is one of evidence upon which the jury should pass, if there is any evidence upon the matter.

I think there is, and that the effect of it was for them to consider.

It was admitted that if there was any evidence to go to the jury upon this point, then the ruling could not be supported.

Now, it is proved that the plaintiff came to the platform station of the railway and signalled the car with the intention of taking passage thereon. There was a response made to this signalling by the slowing down of the car as it neared the platform.

The plaintiff made up her mind that the speed was yet too fast for her to attempt to board the car, but it may be fairly inferred that the conductor thought otherwise, so that he made an effort to help the plaintiff by seizing her hand as the car was going past: at the same time he rang the bell, which appears to have accelerated the speed of the car, and the plaintiff was then dragged along and hurt.

The jury have found that the conductor acted negligently, and that he seized her hand not through impertinence but with a view to help her on the car, or drag her on the car, as they express it.

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It is the duty of the conductor to assist people in getting on and off the car, and it may be within the limit of his duty to assist those who are apparently about to get on a car while it is slowing up.

It would be for the jury to pass upon the circumstances of this case as to the scope of the conductor's authority.

It is suggested in the evidence that his conduct may be attributable to his acting under the influence of liquor, which may account for his over-zeal in laying hold of the plaintiff's hand and making a blunder in the signal.

Altogether, unless the defendant is content with the present findings, and is willing to pay the damages, the action should go for a new trial. Costs to abide the result.

MEREDITH, J.:—I agree in the result.

The plaintiff's case is not necessarily to depend upon any isolated impression she may have had, or given expression to; nor even upon any single fact she may have testified to. The jury might rightly discredit one or the other in coming to a conclusion as to how the accident really happened.

There was really no evidence of anything like an assault, and the jury, very properly no doubt, have negatived any impression that the conductor's conduct was impertinent.

The jury, too, might draw reasonable inferences against the defendants from the fact that they did not call the conductor, or any other of their servants or officers, to prove what actually took place, or what the conductor's duties were.

As the case now stands, a verdict for the plaintiff, on findings, that her injury was caused by the haste of the conductor in signalling the motorman to go on again before the plaintiff was safely on board, could not be disturbed.

She rightly signalled the motorman, and he applied the brakes, so that, apparently, but for the signal to proceed, the car would have stopped and the plaintiff have boarded it without injury or difficulty—in other words, that the conductor was “in too much of a hurry,” a thing not quite unknown, especially when a car is “behind time.”

The cases the defendants rely upon are quite different: the *Coll* case was one of a *motorman*, who had no control over, or

authority to interfere with, persons on the car, pushing a person, who was not a trespasser, off the car; the *Emerson* case was one of trespass to the person; and the *James* case was one of false imprisonment and malicious prosecution.

G. A. B.

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[IN CHAMBERS.]

SMITH V. HUNT.

1902
Dec. 8.

Appeal—Supreme Court of Canada—Extension of Time—Intention to Appeal—Suspension of Proceedings—Merits.

Upon an application to extend the time for appealing from the Court of Appeal to the Supreme Court of Canada the applicant must shew a *bonâ fide* intention to appeal, held while the right to appeal existed and a suspension of further proceedings by reason of some special circumstances. No such case having been made out here, and the Court not being impressed with the merits of the defence, leave to extend the time was refused.

In re Manchester Economic Building Society (1883), 24 Ch. D. 488, followed.

THIS was a motion on behalf of the defendants Hunt and Roberts for an order extending the time for appealing to the Supreme Court of Canada from the judgment pronounced by the Court of Appeal on the 19th of September, 1902, reported 4 O.L.R. 653.

The motion was argued in Chambers on November 27th, 1902, before Moss, C.J.O.

D. L. McCarthy, for the motion.

F. A. Anglin, K.C., contra.

December 8. Moss, C.J.O.:—The first proceeding taken towards an appeal seems to have been on the 17th of November, when a notice of intention to appeal was served upon the plaintiffs' solicitors. Assuming the case to be one requiring the giving of a notice of intention to appeal, it was long out of time: R.S.C. 1886, ch. 135, sec. 41. But as no notice was

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needed, the service can only be material as evidencing an intention to appeal from the judgment of this Court.

The affidavit filed in support of the motion is made by one of the solicitors for the applicants, who says that he was advised by his client Roberts that on or about the end of September negotiations between the parties interested in the action began with a view of an amicable settlement; that the negotiations continued until Monday the 17th of November; that then Roberts and an attorney from Detroit came to Windsor, and were in negotiation all that day with the solicitors for plaintiff, but found it impossible to reach a settlement. The affidavit then states: "We were then instructed by our clients to give notice of an appeal, and proceed to an appeal to the Supreme Court of Canada."

The notice was served, and on the 20th of November leave was applied for and granted to serve notice of this application.

Upon an application of this nature it lies upon the applicant to shew, amongst other things, a *bonâ fide* intention to appeal, held while the right of appeal existed, and a suspension of further proceedings by reason of some special circumstances. No such case is made out in this instance.

The affidavit seems to lead to the conclusion that the intention to appeal was formed on the 17th of November and not before. If there was a previous intention, there is no proof that it was communicated to the plaintiff or his solicitors, or that there was any stipulation made or understanding arrived at, that the time for appealing should not be considered as running during the negotiations. All that appears here is that after an adverse judgment in this Court, the applicants or some persons on their behalf engaged in some negotiations for a settlement, and these failing, the applicants instructed an appeal to be taken to the Supreme Court.

In the case, *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488, it was said by Brett, M.R., that in dealing with an application of this kind, the only rule is that the Court, exercising its judicial discretion, is bound to give special leave, if justice requires that leave should be given: p. 497. I am not impressed with the merits of the defence, and justice appears to me to be with the plaintiff.

I think the applicants have shewn no sufficient grounds for invoking the aid of the Court at this stage.

In any case I should not have extended the time in favour of the applicant Roberts. He did not appeal to this Court, but, as a respondent some objections to the judgment were urged on his behalf. They were chiefly in respect of the jurisdiction of the Court and the costs of the action, and under the circumstances an appeal on these grounds should not be aided.

Motion refused with costs.

G. A. B.

Moss, C.J.O.

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[IN CHAMBERS.]

RE NORRIS

AND

RE DROPE.

1902

Dec. 18.

Lunatic—Care of—Lunatic's Estates—Committee's Duty as to—Schemes for Maintenance—Taxation of Costs.

The rule has for many years been that when the Court intervenes in respect to the property of persons not *sui juris* the moneys shall not be left to private investment but shall be paid into Court and become subject to its general system of administration by which the interest will be punctually paid and the corpus will always be forthcoming when needed.

The general rule to be observed by local officers when it is advisable that the estate should be realized and turned into money is that the fund so realized shall be paid into Court; and when part of the estate is converted and part kept for the abode of a lunatic or otherwise, the scheme for dealing with the whole shall be reported to the Court that proper directions may be given.

In two cases where Local Masters had reported schemes for the maintenance of lunatics and made provision for the moneys of the estates being collected by the respective committees and thereafter for their investment by the committees on securities of different kinds at their discretion, and in one case had taxed the costs and inserted the amount in the report:—

Held, that it is imperative that the costs in lunacy matters be taxed by the proper officer in Toronto as the Local Master has no authority to tax them. And

Held, that the moneys in the hands of the committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court.

MOTIONS to confirm two reports of local Masters respecting schemes for the maintenance of two lunatics and to adopt the schemes.

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In re Norris: The Master reported that he found the personal estate of the lunatic, consisting of a bank deposit, a promissory note and furniture, amounted to \$990; and the real estate, consisting of a house and five acres of land, amounted to \$1,000, which latter was vacant and in arrear for taxes to the extent of \$23; that the lunatic was living with and well cared for by her brother at an expense of \$15 a month; that the committee had given a bond for \$4,000 as security, which he had approved of, and he reported a scheme for the management of the estate by which the committee was authorized to realize the estate and invest the proceeds in mortgages and apply the income and such part of the principal as would be necessary in paying the \$15 a month for maintenance; and if any surplus of income to similarly invest it, etc.

In re Drope: The Master reported that he found the personal estate of the lunatic, consisting of cash, a mortgage, and other securities, amounted to \$4,117.34, and that there was no real estate; that the committee had given a bond of the London Guarantee and Accident Company Limited for \$4,000 as security, and he reported a scheme for the management of the estate by which "all moneys coming to the said lunatic be invested (by the committee) in such securities as were authorized by the Trustee Investment Act, and the income used," etc.; and he taxed the petitioner's costs as between solicitor and client under the order of reference, and inserted them in the report.

The motions were argued in Chambers on the 8th of December, 1902, before BOYD, C.

Swabey, for the committee in *Re Norris*.

W. F. Kerr, for the committee in *Re Drope*.

December 18. BOYD, C.:—These are lunacy matters in which it was referred to local officers to report a scheme for the maintenance of the lunatic and the disposal of his property.

The general form of orders in lunacy matters requires the committee when appointed to account yearly for his dealings with the estate and to pay the balance which may be in his hands into Court.

In the schemes now reported in these two cases provision is made for the moneys of the estate being collected by the committee and thereafter for the investment of the moneys by the committee on securities of different kinds at the discretion of the committee.

These directions are in contravention of the settled policy of the Court, as well as at variance with the general direction in the particular orders as to payment into Court.

Much injury and loss has resulted in past times from the careless handling of the property of persons not *sui juris* by guardians, trustees and committees, and the rule has for many years been that when the Court intervenes in such cases the moneys shall not be left for private investment but shall be paid into Court and become subject to its general system of administration by which the interest will be punctually paid and the corpus will always be forthcoming when needed. Though it may seem that a greater return could be had from other methods of investment, yet when the expense of procuring loans, examining titles, and passing the securities before the local Master are taken into account, no preponderance of advantage will be gained to countervail the absolute security of the fund when in the hands of the Court.

The rule to be observed by the local officer in the case of small estates which may be barely sufficient, or perhaps insufficient, to yield a yearly return for the lunatic's maintenance, and in which it is necessary or advisable to collect the personalty and sell the realty so as to turn all into money, is that the fund so realized shall be paid into Court.

So when part of the estate is converted and part left for the abode of the lunatic or otherwise, the scheme for dealing with the whole should be reported to the Court that proper directions may be given.

In all these lunacy matters it is imperative that the costs be taxed by the proper officer in Toronto. In one of these cases the Master has assumed to tax these costs, which he has no right to do under rule 85, and his irregular action in taxing has been left in the report without being subject to revision, which would have been a necessary thing had the jurisdiction to tax been rightly exercised by the local Master.

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In both these cases the direction will be that the moneys in the hands of the committee and to be collected from the debtors, or by sale of the land, be forthwith paid into Court. The official guardian will intervene in the usual way and on the usual terms to see that all is done as directed.

G. A. B.

[IN CHAMBERS.]

1902

Dec. 10.

RE ROCHON V. WELLINGTON.

THE CANADIAN COPPER CO.,
GARNISHEES.

Prohibition—Garnishment of Married Man's Wages—Exemption—Evidence of Marriage—Repute—R.S.O. 1897, ch. 60, secs. 180 and 181.

In a division court action the Judge held that evidence of repute was not sufficient to prove that a primary debtor was a married man and so entitled to the \$25 exemption provided for by R.S.O. 1897, ch. 60, secs. 180 and 181:—*Held*, that he had not decided upon a state of conflicting facts but upon a theory that the best evidence must be given, which was a wrong assumption in point of law, and prohibition was granted.
Elston v. Rose (1868), L.R. 4 Q.B. 4, followed.

THIS was a motion for prohibition directed to the clerk of the 4th division court of the district of Nipissing, in an action in which Anthony Rochon and Felix Rochon were primary creditors, William H. Wellington was primary debtor, and the Canadian Copper Company were garnishees, to prohibit the said clerk from paying over a sum of \$25 claimed under the circumstances set out in this report, and to restrain the primary creditors from enforcing a judgment pronounced in their favour on 21st November, 1902, by the Judge of said division court as to the \$25.

The primary creditors had brought their action for goods sold and delivered, and having served the statement provided for in sub-sec. (2) of sec. 182 R.S.O. 1897, ch. 60, attached wages due the primary debtor by the garnishees. The primary debtor filed with the clerk of the Court a notice

claiming the exemption of \$25 allowed by section 180 of the statute.

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After the service of the garnishee summons, the primary debtor assigned his wages to one J. H. Clary for value, and left the country before the trial.

At the trial the assignee attended and claimed the \$25 under his assignment, and the trial Judge ruled that the onus was upon him to prove that the debtor was a married man.

He gave evidence of repute to the effect that the primary debtor had been known as a married man during his four years' residence in the town of Sudbury, where he earned the wages, and had been keeping house apparently as a married man with a wife and children, whom he supported as such, and that they went away with him.

The trial Judge held that such evidence of repute was not the best evidence, was not sufficient, and that the evidence of the primary debtor himself would be the best evidence, and that he should be called to testify and so prove his marriage; and as he was not called, he gave judgment in favour of the primary creditor, finding that the marriage had not been proved, and that the primary debtor was not a married man, and consequently was not entitled to the exemption.

The claimant then moved for prohibition, and the motion was heard in Chambers on the 8th of December, 1902, before BOYD, C.

W. E. Middleton, for the motion.

Edward Bayley, contra.

December 10. BOYD, C.:—In this case all the evidence adduced went to prove that the primary debtor was married and with a number of children whom he supported.

This was made out with reasonable clearness and sufficiency as a matter of repute extending over at least four years, a long period in a mining district.

The learned Judge did not decide upon a state of conflicting facts but upon the theory that the best evidence must be given, and that it was essential to produce the debtor (who could not be found) and prove the fact of actual marriage by him.

Boyd, C.

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RE ROCHON
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This appears to have been a wrong assumption in point of law, by which was nullified the beneficial result of exemption as extended to labourers' wages up to \$25 from the effects of compulsory process: R.S.O. 1897, ch. 156, sec. 7, and ch. 60, secs. 180 and 181.

The principle of law laid down in *Re Elston v. Rose* (1868), L.R. 4 Q.B. 4, justifies granting prohibition in this case as asked. See also *The Liverpool United Gas Light Co. v. The Overseers of the Poor of Everton* (1871), L.R. 6 C.P. 414.

No costs.

G. A. B.

[BOYD, C.]

FARLEY V. SANSON.

1902

Nov. 13.

Nov. 17.

Landlord and Tenant — Lease — Renewal of—Right to Demand—Laches—Appointment of Arbitrators—Injunction to Restrain Proceedings Before Sole Arbitrator—Jurisdiction.

The renewal clause in a lease provided that at the expiration of the term the lessors might at their election either take the lessees' improvements at a valuation to be fixed by arbitrators prior to such election being made, or grant a new lease for a further term. No time limit was fixed within which the arbitration should take place, and either party might require the other to appoint an arbitrator within seven days, and on default might appoint a sole arbitrator. The lease terminated November 1st, 1900, and on April 30th, 1900, the lessees wrote saying they had no desire to renew and would be glad to give up possession. The lessors, however, did nothing to relieve the lessees of possession; but, on the contrary, in June and July, 1901, they endeavoured unsuccessfully to have the assessment roll altered by preserving the tenants' names thereon as still tenants. On February 15th, 1902, they gave notice to arbitrate requiring the lessees to appoint an arbitrator:—

Held, that the lessees were not precluded by delay from enforcing renewal of the lease.

The lessees, disputing their obligation to take a renewal lease, and desiring to have that point first decided, appointed their arbitrator under protest, but the lessors refused to accept such nomination, and appointed a sole arbitrator:—

Held, that the Court had jurisdiction to restrain proceeding before a sole arbitrator, and injunction granted accordingly.

THIS was an action by the lessees under a lease from the defendants, the rector and wardens of Trinity Church, Toronto for a declaration that they were not obliged to take a renewal of the lease, and for an injunction to restrain defendants from proceeding with an arbitration to fix a renewal rent, under the circumstances mentioned in the judgments.

The action was tried before BOYD, C., at the non-jury sittings at Toronto on the 12th and 13th day of November, 1902.

T. D. Delamere, K.C., for the plaintiffs, contended that under the terms of the lease and the circumstances shewn in evidence, the defendants were precluded by delay from enforcing a renewal of the lease: Fry on Specific Performance, 3rd ed., pp. 504-5; *Southcomb v. Bishop of Exeter* (1847), 6 Ha. 213; *Husham v. Llewellyn* (1873), 21 W.R. 570; *Glasbrook v. Richardson* (1874), 23 W.R. 51; *Parkin v. Thorold* (1852), 16 Beav. 59; that the plaintiffs were entitled to name an arbitrator

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under protest, and the defendants should be restrained from proceeding before the sole arbitrator appointed by them: *Hamlyn v. Betteley* (1880), 6 Q.B.D. 63; *Pickering v. Cape Town R. W. Co.* (1865), L.R. 1 Eq. 84; *Direct United States Cable Co. v. Dominion Telegraph Co.* (1883), 8 A.R. 416.

A. E. O'Meara, for the defendants, contended that the contract was a perpetually renewable lease, with option on the part of lessors to pay for improvements; that no time was limited for taking steps to arbitrate, and either party might take the first step; that the position of the plaintiffs not having been prejudiced, mere delay did not affect the right of defendants to enforce renewal: *Lennon v. Napper* (1802), 2 Sch. & Lef. 682; *Chesterman v. Mann* (1851), 9 Ha. 206; *Hersey v. Giblett* (1854), 18 Beav. 174; *Kay v. Johnson* (1864), 2 H. & M. 118; *Moss v. Barton* (1866), L.R. 1 Eq. 474; *Buckland v. Papillon* (1866), L.R. 1 Eq. 477, 2 Ch. 67; that the plaintiffs might have proceeded with the arbitration under protest, but had no right to make an appointment of an arbitrator to take effect conditionally and at a future time: *Bradley v. London and North-Western R. W. Co.* (1850), 5 Ex. 769; and that, moreover, the Court had no power to restrain arbitrators upon the ground that the arbitrator had not jurisdiction: *North London R. W. Co. v. Great Northern R. W. Co.* (1883), 11 Q.B.D. 30; *London and Blackwall R. W. Co. v. Cross* (1886), 31 Ch. D. 354; *Farrar v. Cooper* (1890), 44 Ch. D. 323.

November 13. BOYD, C.:—This case has been very fully argued, and I am pretty well possessed of all the facts of it, as well as I can be. Some matters of law I perhaps may look at—will look at—and I may perhaps change the legal result, but at present my impression is that unless I see something to the contrary at a later date, the judgment of the Court should be and will be in this form. There are two subjects discussed and in question here, the one a large subject as to whether or not there were any rights existing under the clauses of this instrument of lease providing for renewals in the future—the rights under that instrument—and the more particular question as to whether or not the arbitration to fix those rents can be allowed to proceed *ex parte*, as the defendants propose.

Now, on the larger question, as to the rights under this lease, I am not persuaded and convinced by the arguments that on the facts or the law the churchwardens are deprived of their rights under it. I do not think there has been any such action or inaction on their part as to prevent them from insisting on the right to renew for the next period of 21 years. The lease is a peculiar one, and is singularly silent about certain things that one might expect: "It is hereby declared and agreed that at the expiration by effluxion of time of the term hereby granted, it shall be at the election of the lessors either to take the improvements made by the lessees on the said premises"—one would think that it was at the expiration by effluxion of time that the lessors were to make their election, but when you come to read further on you will see the right of election is thrown forward to a later date, namely, until an award is made; so the collocation of the words is not very happy—"at a valuation, or to grant to the lessees a new lease of the said demised premises for a further term, . . . such valuation of improvements, or such renewal rent, shall prior to the making of such election as aforesaid be ascertained or fixed by the award of three arbitrators, . . . such choosing of arbitrators to be not sooner than one month preceding the determination of the term."

They fix that term for choosing before the end, but are quite silent as to when they shall be chosen after the expiration of the term, leaving it all at large. The choosing of arbitrators may be not sooner than one month, etc., "and provided that if either party refuse or neglect to appoint an arbitrator within seven days after being required in writing by the other of them so to do, such other may appoint a sole arbitrator whose award . . . shall be final," etc. "And the lessors shall and will make such election and declare the same in writing to the lessees within one month after the making of the said award or valuation;" and there is the covenant by the lessees that in the event of granting a renewal lease it will be duly accepted. So that at the expiration of the term there may be, either a month prior to that or after that, a proceeding to arbitrate. After the proceeding to arbitrate has been determined, then the election to take improvements or to renew the

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lease is to be made in writing by the lessors. Now, there is no time limit within which this arbitration is to take place, except it may be a month before the expiry of the term. It is important to observe that it does not lie on one party particularly to take the initiative in that: either party may take the initiative. Either the lessors or lessees may require the other party in writing to appoint an arbitrator, whose award, and so on. So there was no particular burden lying on the one party more than on the other, so far as I can see, on the construction of that instrument. What occurred? There is some evidence of a very disputed kind as to various talks had with the individual churchwardens and with the rector on different occasions, going to shew that it was understood—it did not amount to more than that—it was understood on the part of Mr. Lamb* that there would be no difficulty at the end of the term in putting an end to his lease. Mr. Sanson† gave some explanation of how that matter arose at first. He was under the impression that it was rather a piece of hardship on the lessees: the premises had depreciated, and the rents were high, and there was some slight change in the place, although I suppose that is not a material element in the consideration of the money aspect of the case; but at all events Mr. Sanson thought there was a hard case, and was disposed to be liberal, but when he came to be advised, as he says, that there was a right to require them to take the renewal in the future and it was not optional, he then took the view that they should abide by the lease. Those are the words he used; and so, while there may have been some general talk at first, so that one can reconcile all the evidence in that way, giving the man and his partner to understand that there would be liberal action, or no difficulty in arranging the thing to his satisfaction at the end of the term, it was very far indeed from any engagement of that kind, any contract of that kind at all enforceable, or even at all morally binding on the rector and churchwardens. It is not to be forgotten that they are a corporation. Their joint action is required. They never came together on this question, and putting it even as one witness stated, that Mr. Sanson said he would lay it before

*Mr. Lamb was one of the lessees.—REP.

†Mr. Sanson was the rector.—REP.

the board and they would deal generously, that is a mere expression of expectation, and a wish on his part to do what could be done, but nothing binding, nothing to lead the Court to say that there was any agreement at all recognizable in law that there should be a determination of this leasehold tenure at the termination of this 21 years. So the main part of the case, or one part of the case so far as that is concerned, it seems to me, falls on the evidence, as to there being any agreement to terminate the lease at the end of 21 years.

Then what took place which should disable the corporation, the rector and churchwardens, from proceeding to arbitrate? Now, I do not think that the cases cited by Mr. Delamere on specific performance have much pertinence to this case. It was a case where there was a contract to continue the lease if the parties or if the lessors agreed to do it, and either party might initiate proceedings. Neither was there any change of situation, there was nothing done which involves any right to be equitably relieved on the part of the lessees, or anything done by the corporation which disentitled them to this relief. On April 30th, 1900, the notice was served: "The lease which we hold of you dated April 1st, 1880, terminates by effluxion of time on the 1st November next: we beg to notify you that we have no desire to renew the same, and should be glad at any time to give you possession of the same." Now, there the recognition is that they are in possession of the premises in April, 1900. There was no taking over of the possession proved on the part of the corporation, although it was said some man went in there with the consent of both parties, as far as I can see, and took some cabbages, and put up a fence, and afterwards took away the fence. He relinquished the premises and went out of possession before October 30th. He went away some time in October. At all events the rent was paid for that time by Lamb: there was no change of possession, and at the time when the period arrived on October 30th, or November 1st, as he puts it—it does not matter which date—in law the lessees were then in possession of the premises. Well, there was no act done on the part of the churchwardens to relieve them from that possession, or to take over the possession. It was a vacant property; there was no

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damage done; there were no rents to be drawn; it was an open place, as far as I can judge. The fence was taken away: a very undesirable piece of land, perhaps, in itself: nothing on it: nothing to be gained from it, and nothing to lose from it, and there it was vacant. Legally the tenants were in possession. They had not given up possession. It had not been taken over by the landlords, and so things remained until an act was done on the part of the rector and churchwardens which indicates their intention of continuing the lease and holding them to the terms of it, and that was when the notice was given to change the assessment by giving the names of these two men, Lamb and Farley, as tenants of the land.* That went on more or less until July, and the point was determined against the rector and churchwardens I suppose, because no renewal lease had been granted. It is not important: it is only significant in shewing the action of the churchwardens in electing to grant a new lease. Then they follow that up by the notice to arbitrate on February 15th, 1902. It was competent for the lessees to have given that notice themselves. Of course they did not give it, because they did not wish to renew the lease, but they were not prejudiced in any way by the inaction of the trustees, because they knew before, as I think, that the trustees as a body were not going to accept the possession of the lands from them and let them go. The very inaction of the trustees on this notice of April 30th, when the lessees stated that they were prepared at any time and glad to give up possession, and the refusal of the trustees to take the possession when requested to do so was an indication that they were not going to do it. So there are no facts proved, even if it was a matter of discretion on my part, upon which I could say that this lease was terminated.

It seems to me it is a continuing instrument, and valid to all intents and purposes, if the proceedings are taken to work

*In the spring of 1901 the lessees prevailed upon the City Assessment Department to strike their names as tenants out of the assessment roll. In June, 1901, the lessors appealed to the Court of Revision on the ground that the lease was a perpetual lease, and the names of the tenants should remain on the assessment roll. In July, 1901, the Court of Revision decided against the lessors on the ground that no renewal lease had been actually granted.—Rep.

out the new term in the proper way. And that brings us to the second point, whether the trustees were entitled to proceed, as they did, *ex parte* in this case.

I think Mr. Delamere has put the case entirely in the right position, so far as that is concerned. It does not seem to me that the letter which was written by him was hedging or trying to get an unfair advantage, approbating and reprobating, and saying he would and then he would not. I do not think it is to be read with that view or that result at all. The letter seems a fair enough one. Mr. Delamere, anxious to protect his clients on the legal matters which I have now disposed of, and at the same time not wishing that any advantage should be gained by the trustees in case he was wrong in his view, when they insist on an arbitrator being appointed, says: "We do not feel disposed to allow you to appoint the sole arbitrator, in case any arbitration should go on, and we therefore on behalf of our clients name Mr. Martin McKee of, etc., as their arbitrator in case we shall be compelled at any time to go on with the arbitration. Meantime we protest against the whole matter and make this appointment entirely without prejudice to the position of our clients, warning you that we are not by naming this man doing anything more than preventing a technical advantage to you in case we should allow the seven days to pass, but you are not to consider this as a consent to go on with the arbitration or to renew the lease" I have commented on that already. That means if the churchwardens were determined to go on, and if he was compelled to go on before determining the legal questions, then we, on behalf of our clients, name McKee, etc., and then they say they make the appointment entirely without prejudice, and then he says, to shew the good faith in this, "Kindly let us have the name of your arbitrator." He was not fencing, and was not saying he was not appointing, or appointing on a contingency. He does appoint, and says "Let us have the name of your arbitrator, if you intend to appoint one:" that is to say, "If you are not influenced by my view to have the legal questions determined first, and if you are determined to go on with the arbitration, to press it on, and coerce me to go on too, why, then, name your arbitrator and we

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will see what is to be done." Instead of that they ignored it. They say in effect that is not the sort of appointment you are to make: you are to make an unconditional appointment, and we will wipe that out and appoint our man and go on *ex parte*. I do not think it is competent to do that, and it seems to me the Court has jurisdiction to say "You shall not go on *ex parte*." If I find in law the Court is not hampered by want of jurisdiction in view of the cases cited, with which I am not familiar enough to express an opinion, if the Court has jurisdiction the judgment will be in this way: first of all, that the right to renew exists for anything that appears up to the present time, and that there is no right to arbitrate *ex parte*, and relief accordingly, either by injunction or declaration; and in such event, as the success is divided, the judgment will be without costs. That is not the final judgment, because I still have to look at the points about jurisdiction under the head of arbitrations.

Afterwards on November 17th, 1902.

BOYD, C.:—The plaintiff contended that there was no right to arbitrate as to a new lease on account of the conduct of the lessors, and was unwilling to arbitrate till this was determined. The defendants, however, urged on the preliminaries for the purpose of having arbitrators appointed, and to this the plaintiff responded by naming an arbitrator under protest, so as to save his rights in regard to his contention. This nomination the defendants refused to accept, and proceeded to appoint a sole arbitrator, based on the ground of the alleged refusal of the plaintiff. This, I think, the defendants had no power to do, and to restrain this assumption of power on the part of the defendants the action is brought. As regards the defendants' objections, on which I reserve judgment, I think the Court has jurisdiction to restrain the prosecution of the matter by the sole arbitrator named by the defendants, ignoring the nominee of the plaintiff. The arbitration might have proceeded in the ordinary form of three arbitrators, notwithstanding the protest of the plaintiff, and he might at the end have had the benefit of his legal objection: *Ringland v. Lowndes* (1864), 17 C.B. N.S.,

514, and *Direct Cable Co. v. Dominion Telegraph Co.* (1881), 28 Gr. 648.

The case in hand is more under the authority of *Kitts v. Moore*, [1895] 1 Q.B. 253, as to the power to enjoin in such a case as this than under *North London R. W. Co. v. Great Northern R. W. Co.* (1883), 11 Q. B. D. 30, relied on by the defendants. This case also resembles *Beddow v. Beddow* (1878), 9 Ch. D. 89, in that the sole arbitrator is not, as appointed, of competence to deal with the controversy involved in the arbitration as to the renewal of the lease. The argument of counsel, who succeeded in *Farrar v. Cooper* (1890), 44 Ch. D. 323, at p. 327, justifies the course of the plaintiff in naming an arbitrator under protest, and then coming to the Court for an injunction when that nomination was brushed aside and a sole arbitrator appointed by the defendants.

The judgment pronounced at the hearing of the case will therefore become absolute.

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[IN CHAMBERS.]

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McLAUGHLIN V. MAYHEW ET AL.

Jan. 5.

Appeal—Court of Appeal—Late Entry—Refusal of Consent—Confirmation—Responsibility for Delay—Costs.

The defendants on the 19th May gave notice of an appeal to the Court of Appeal from a judgment delivered on the 22nd April, and gave security on the 22nd May. Reasons of appeal were not served till the 10th September, and reasons against appeal not till the 13th October. The next sitting of the Court of Appeal was set for the 10th November. The appeal case was not prepared in time to enter the case on the 6th November, and the plaintiff's solicitor refused to consent to its being entered on the 10th for the sittings beginning on that day. The case was entered without consent on the 17th November, and a motion was made to confirm the entry:—

Held, that the plaintiff's solicitor should have consented to the proposed entry on the 10th November, and the subsequent entry should be confirmed; and, as both parties were nearly equally blameable for delay, there should be no costs.

THIS was a motion by defendants (appellants) to allow the entry and setting down of the appeal, which were made out of time, to stand, notwithstanding the irregularity. The facts are stated in the judgment.

The motion was heard by MACLENNAN, J.A., in Chambers, on the 23rd December, 1902.

F. E. Hodgins, K.C., for the motion.

O. M. Arnold, contra.

January 5. MACLENNAN, J.A.:—Judgment for the specific performance of a contract for the sale of land, delivered on the 22nd April, 1902; notice of appeal, 19th May; security by deposit of \$200, 22nd May; reasons of appeal served 10th September; and reasons against appeal, 13th October. These dates shew considerable delay in preparing reasons by both parties, for which no sufficient excuse is shewn by one or the other. The next sitting was on the 10th November, and the case should have been set down not later than the 6th November to be in the list for that sitting. From the 13th October everything was in order but to prepare the appeal case and the copies thereof, and what the appellants' solicitor says is, that owing to unforeseen delays the books were not received back

from the printer properly bound and ready for the setting down of the appeal, that is, as I understand, before the 6th November. On the 7th November the appellants' solicitor wrote to the respondent's solicitor saying he was getting the books prepared as fast as possible, and would have the case put on the list, to which the latter replied on the same day, noting that the books would be completed in a few days, "when I will receive the same." On the following day, however, he wrote saying, "Please do not ask me to consent to the appeal going on now," and that it would be unjust to ask the plaintiff to wait any longer. This was answered on the 10th, urging consent to set the case down for the sittings beginning on that day. An answer was received on the 15th, saying he must consult his client. No final answer was received until the 10th December, when consent was refused. In the meantime the case was set down on the 17th November.

The present motion was made as soon as the refusal of the 10th December was received.

Under all these circumstances, having regard to the delays on both sides, and to all that had passed between the parties, the respondent's solicitor might well have consented to the setting down of the case as requested in the letter of the 10th November. If that had been done, the appeal might have been heard, and this motion would have been unnecessary.

One of Mr. Arnold's arguments was that the appellants had not given the security required by Rule 827 (c), and so their appeal was fatally irregular. But the security required by that Rule is not essential to an appeal, but only to a stay of execution.

I therefore think the motion to confirm the setting down of the case should succeed, but, as both parties are nearly equally blameable for delay, there should be no costs.

E. B. B.

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[IN THE COURT OF APPEAL.]

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Dec. 3.

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THE OTTAWA AND NEW YORK RAILWAY CO.

Railway—Alighting from Train while in Motion—Negligence—Contributory Negligence.

The fact of a passenger getting off a train while it is in motion is not necessarily negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances.

Where a train, scheduled to stop at a named station, did not on arriving there stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started again, fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the Court declined to interfere with the finding.

THIS was an appeal from the judgment of MacMahon, J., in an action tried before him with a jury at Ottawa on the 13th January, 1902.

The action was brought to recover damages for an accident sustained by the plaintiff through the alleged negligence of the defendants.

The plaintiff, on the 29th December, 1901, was a passenger on the defendants' railway from the city of Ottawa to Finch station, on the same line of railway.

On the arrival of the train at Finch station it did not stop, as alleged by the plaintiff, for a sufficient length of time to allow him to alight from the train to the station platform, and in attempting to do so, while the train was in motion, he fell and was injured.

At the close of the case a nonsuit was moved for.

The learned Judge reserved the consideration thereof, and subject thereto, left the following questions to the jury:—

1. How long did the train stop at Finch station?

Ans. Cannot say.

2. Was the time the train remained there sufficient to allow the plaintiff to alight?

Ans. No.

3. Was Keith aware when he reached the platform of the car that the train was in motion?

Ans. Yes.

4. If Keith was guilty of any negligence which contributed to the accident, what was such negligence?

Ans. None.

5. If Keith is entitled to recover, at what do you assess the damages?

Ans. \$1000.

The learned Judge subsequently delivered the following judgment.

February 10. MACMAHON, J.:—The motion for nonsuit cannot prevail. In my charge to the jury I said: "If they (the company) gave the plaintiff ample facilities to get off, but he did not do so, but attempted to get off when he knew there was danger in getting off, the company ought not to be held responsible for his act; and, looking at it in that way, it is for you to say whether he acted reasonably in getting off under the circumstances appearing in the evidence." The answer, therefore, to the fourth question, that the plaintiff was not guilty of any negligence which contributed to the accident, is a finding that he was acting as a reasonable man would in getting off a train, although it was in motion. And, according to the evidence of Daniel E. Seese, the company's station agent at Finch, the car had only gone thirty feet when the plaintiff got off, and the jury might properly conclude the plaintiff was not acting unreasonably in endeavouring to alight.

In *Washington and Georgetown R. W. Co. v. Harmon* (1893), 147 U. S. R. 571, Chief Justice Fuller, in delivering the judgment of the Supreme Court, at p. 583, said: "The duty resting upon the defendant was to deliver its passenger, and that involved the duty of observing whether he had actually alighted before the car was started again. If the conductor failed to attend to that duty, and did not give the passenger time enough to get off before the car started, it was necessarily the neglect of duty that did the mischief. It was not a duty due to a person solely because he was in danger of being hurt,

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but a duty owed to a person whom the defendant had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger."

In *Central R. W. and Banking Co. v. Miles* (1889), 88 Ala. 256, where the plaintiff, who was a passenger, got up from his seat as soon as the train stopped at the station, and moved towards the door, and when he reached the platform, found the train had started, but he, notwithstanding, stepped off and was injured, it was held by the Supreme Court of Alabama that he was not guilty of contributory negligence as a matter of law, but the question was properly submitted to the jury. The Court, at p. 262, said: "The general rule, established by the weight of authorities is, that where a train is stopped at a station to which the company contracted to carry a passenger, the company is liable if a reasonable time to leave is not afforded, and he is injured in that attempt to alight after it is started and while in motion, if he does not in getting off incur a danger obvious to the mind of a reasonable man. . . . But, notwithstanding the company may be in fault, a passenger is not justified, in order to avoid being carried beyond his stopping place, to defy obvious danger, such as an attempt to jump from a train in rapid motion. But an attempt for such purpose is not negligence in law if the train was stopped, but not a reasonable time, and is moving so slowly that to alight from it would not appear dangerous to a man of ordinary prudence."

See also *Loyd v. Hannibal and St. Joseph R.W. Co.* (1873), 4 Am. Neg. Cas. 481; *Covington v. Western and Atlantic R.W. Co.* (1888), 81 Ga. 276; *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754; *Filer v. New York Central R.W. Co.* (1872), 49 N.Y. 47.

I direct that judgment be entered for the plaintiff for \$1000 with costs.

From this judgment the defendants appealed to the Court of Appeal.

On the 22nd of April, 1902, the appeal was argued before OSLER, MACLENNAN, MOSS and GARROW, JJ.A.

W. R. Riddell, K.C, for the appellants. The jury should have answered the first question, for if they had done so and

found the length of time that the train remained at the station it would have had a most important bearing upon the answer to the second question. The second question is contrary to the evidence, for the evidence shewed that there was sufficient time allowed to have enabled the plaintiff to have alighted from the train. The plaintiff, however, cannot recover upon the finding to the third question, that he jumped while the train was in motion. This, in itself, constituted an act of negligence, unless there was danger in remaining on the train, or there was an inducement held out by those in charge of the train for him then to get off the train. The facts were all admitted, and on the admitted facts there was nothing to submit to the jury, and the learned Judge should have nonsuited the plaintiff: *Siner v. Great Western R. W. Co.* (1868), L.R. 3 Ex. 150; (1869), L.R. 4 Ex. 117; *Adams v. Lancashire and Yorkshire R. W. Co.* (1869), L.R. 4 C.P. 439. The case is distinguishable from *Edgar v. Northern R. W. Co.* (1884), 11 A.R. 452, there, there was a direct invitation to alight. There was no such invitation here. The American cases are fairly unanimous in holding that if a passenger gets off a moving train he does so at his own risk: *Pennsylvania R. W. Co. v. Aspell* (1854), 23 Penn. St. 147; *Pennsylvania R. W. Co. v. Lyons* (1889), 129 Penn. St. 113; *New York, Lake Erie and Western R. W. Co. v. Enches* (1889), 127 Penn. St. 316; *Burrows v. Erie R. W. Co.* (1876), 63 N.Y. 556; *Jewell v. Chicago, St. Paul and Minneapolis R. W. Co.* (1882), 54 Wis. 610; *Walker v. Vicksburgh, Shreveport and Pacific R. W. Co.* (1889), 41 La. 795; *Toledo, St. Louis and Kansas City R. W. Co. v. Wingate* (1895), 143 Ind. 125; *Merritt v. New York, New Haven and Hartford R. W. Co.* (1894), 162 Mass. 326, 329; Beach on Contributory Negligence, 3rd ed., secs. 147, 305; *Central R. W. and Banking Co. v. Miles*, 88 Ala. 256. In any event there should be a new trial by reason of the omission to answer the first question, and also because the damages are excessive.

W. H. Blake, K.C., for the respondents. The question to be dealt with here is, whether it is *prima facie* evidence of negligence to get off a moving train. The question to be decided in

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every case is whether under the particular circumstances a prudent man would have attempted to get off: Beach on Contributory Negligence, 3rd ed., sec. 147; Wood on Negligence, 305; *Bridges v. Directors, etc., of North London R. W. Co.* (1873), L.R. 7 H.L. 213; *Cockle v. London and South Eastern R. W. Co.* (1872), L.R. 7 C.P. 321. The Court must be governed by the English and Canadian decisions, as no definite rule can be got from the American ones, which are most conflicting. The plaintiff, however, relies on the law laid down in *Edgar v. Northern R. W. Co.*, 11 A. R. 452, which goes farther than the plaintiff is required to go in this case. There the train had not arrived at the station, and the plaintiff before the train had stopped attempted to get off. The argument, on part of the defence, was that he should have waited until the train stopped, but it was held that it was a question for the jury, whether, having an invitation to alight, he had acted as a reasonable man would do in attempting to get off. Here, there was also an invitation to alight, and the plaintiff attempted to get off the train, when he was stopped by those getting on from the station, and he thought the train had not sufficient way on to prevent his doing so. All the facts were left to the jury, who were to decide on the facts, and they were of opinion that he did not act unreasonably under the circumstances. As to the first question it is not essential that it should have been answered: the material question being the second, namely, whether the train had stopped for a sufficient length of time to enable the passenger to get off. They have found that it did not stop a sufficient length of time, and under the answers to the other questions, the plaintiff is entitled to recover.

December 3. Moss, C.J.O.:—The defendants appeal from the judgment entered at the trial of this action by MacMahon, J., upon the answers of the jury to certain questions.

The action was for damages for injuries sustained by the plaintiff in alighting from the defendants' train at Finch station on the 29th of December, 1900, owing, as he alleged, to the negligence of the defendants in not stopping the train for a sufficient time to enable him to alight while it was at a standstill.

The defences were denial of any negligence on the defendants' part; that any injury or damage suffered by the plaintiff was occasioned by his own negligence and want of care, and that by the exercise of reasonable and ordinary care he might have avoided such injury or damage.

The jury were asked certain questions, and their findings in answer thereto may be summarized as follows: They could not say how long the train stopped at Finch, but it was not stopped for a sufficient time to enable the plaintiff to alight. The plaintiff was aware when he reached the platform of the car in which he was that the train was in motion. He was guilty of no negligence which contributed to the accident. He was entitled to \$1000 damages.

Upon these findings the learned trial Judge entered judgment for the plaintiff for \$1000 with costs.

The defendants appealed, contending that the learned Judge should have entered a nonsuit on the grounds that the act of alighting from a moving train was in itself negligence on the part of the plaintiff which relieved the defendants from liability for damages in the absence of circumstances tending to excuse or justify the act, and that if the defendants were guilty of negligence in not stopping the train for a sufficient time to allow the plaintiff to alight, the damages claimed were too remote.

They also contended that upon the evidence the jury should have found that the train was stopped for a sufficient time to enable the plaintiff to alight and that the plaintiff was guilty of contributory negligence. They submitted further that the learned Judge should not have entered judgment for the plaintiff in face of the jury's answer that they could not say how long the train was stopped, and that the damages were excessive.

I think the learned Judge properly declined to withdraw the case from the jury. I do not understand the defendants' proposition to go the length that under no circumstances and in no case is a person justified in alighting from a moving train, but that presumptively it is an act of negligence, and if any injury result from it the party suffering the injury cannot recover damages without shewing circumstances tending to

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excuse or justify the act. I am disposed to think that the rule of conduct as stated by the defendants is not strictly accurate, but if it be the rule, then it must follow that when circumstances are stated, it is for the jury to consider and determine as to their sufficiency.

In this case there were circumstances stated which could not have been withdrawn from the jury. And it was for the jury to say, upon the evidence, whether the plaintiff's injuries were caused by the negligence of the defendants or were the result of his own carelessness and negligence. Upon the motion for nonsuit, the question for the learned Judge was whether, assuming as for the purposes of the motion for nonsuit it was to be assumed that the defendants were negligent in not stopping their train for a sufficient time to enable the plaintiff to alight, there was evidence upon which the jury might find that the injury was the result of that negligence, and was not occasioned by the plaintiff's own negligent and imprudent act in attempting to alight while the train was in motion. And if the jury could reasonably find in favour of the plaintiff on this question, the damages would not be too remote. The nonsuit was therefore rightly refused.

There was evidence upon which the jury might find, as they did, that the train was not stopped for a sufficient time to enable the plaintiff to alight. The jury having so found, a case of negligence was established against the defendants. To relieve themselves of liability for such negligence, they were obliged to shew that it did not contribute to the plaintiff's injury.

The next inquiry, therefore, is whether the learned trial Judge properly submitted the question of the plaintiff's conduct to the jury, and whether there was evidence to support their finding. The point to be determined by the jury was whether the plaintiff acted in a reasonable and prudent manner in endeavouring to alight from the car while it was moving at the rate spoken of in the evidence. The question involved consideration of the circumstances. Finch station was the plaintiff's point of destination on the defendants' line. The train was leaving it without his having been afforded a proper opportunity of alighting. It was for the jury to consider and

say whether, taking into consideration the plaintiff's position when the train began to move, the speed it had attained, the point it had reached before he got on the step, the place on which he could alight, the effect upon his movements of the bundle or parcel which he carried, and the other circumstances, the plaintiff was guilty of negligence in attempting to alight.

The question was not given to the jury in this form. But the question actually put must be read in connection with the charge. The learned Judge explained to the jury that if the defendants did not stop the train for a sufficient time to enable the plaintiff to alight, or did not afford him proper facilities for alighting before the train was started, they were guilty of negligence. He then adverted to the starting of the train, the plaintiff's position in the car at that time, his carrying a bundle in one hand, and the speed of the train when he reached the platform, and told them that it was for them to say whether he acted reasonably under the circumstances appearing in evidence. Substantially, he left it to the jury to say whether the plaintiff was in fault at all. The question he submitted was: "If Keith was guilty of any negligence which contributed to the accident, what was such negligence?"

The answer of the jury was that the plaintiff was guilty of no negligence which contributed to the accident. Having regard to the terms of the charge, this is a finding that the plaintiff acted reasonably and was not in fault. There is evidence upon which the jury might properly come to this conclusion, and judgment was therefore properly entered for the plaintiff. In view of the finding that the train was not stopped a sufficient time to enable the plaintiff to alight, the question as to the exact time was immaterial. If the jury had found it, they would still have been obliged to say whether it was sufficient.

Complaint was also made that the damages were excessive. The plaintiff's injury was of a very painful kind. The question of the period within which he might have fully recovered was complicated to some extent by another accident he met with between five and six weeks afterwards, resulting in a fracture of the leg previously injured or affected.

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But the jury were carefully cautioned not to take that into consideration, and to confine their award of damages to the injury sustained at Finch, and it must be assumed that they have done so. There was evidence that at the time of the trial, rather more than a year after the accident, he was still suffering from its effects.

The amount awarded is not so large as to suggest any mistake, misapprehension or prejudice on the part of the jury.

The appeal should be dismissed.

OSLER, J.A. :—Action for injuries sustained by the plaintiff, a passenger on the defendants' railway, by reason, as it is alleged, of their negligence.

Judgment was directed by MacMahon, J., for the plaintiff on the answers of the jury at the trial, and the defendants appeal.

The case made by the plaintiff at the trial and afterwards in this Court was that he was received as a passenger from Ottawa to Finch station, on the line of the defendants' railway: that on arriving at that station the train stopped to let off and take on passengers: that the plaintiff was about to get off there, and had got as far as the platform of the car on his way out when the train was started: that by defendants' neglect and breach of duty a reasonably sufficient time was not allowed to elapse to enable the plaintiff and the other passengers for that station to alight: that immediately after the train had so started, and while it was proceeding very slowly along the side of the station platform, and while the plaintiff reasonably believed that he could do so with safety, he alighted from the train on the platform at Finch station and received the injuries complained of.

The case thus stated is supported by the evidence and by the findings of the jury on the questions put to them by the trial Judge. They were unable to say how long the train had stopped at the station—a question about which there was some conflict in the evidence—but they found that the time it did remain there was not sufficient to enable the plaintiff to alight: that the plaintiff was aware when he reached the platform of

the car that the train was in motion, and that he was not guilty of any negligence which contributed to the accident.

The last answer is to be read in connection with the learned Judge's charge, in which he substantially directed them that even if the defendants had been negligent in not giving sufficient time to alight, the plaintiff could not recover if he knew there was danger in getting off when he did; and that, assuming that defendants had been guilty of a breach of duty, the question was whether, under all the circumstances and considering the rate of speed at which the train was moving, the plaintiff had acted reasonably in getting off. There was no objection to the charge on the part of the defendants except in the line of their main defence to the action, viz., that the getting off or jumping off the train after it was in motion was in itself, and without regard to the particular neglect or breach of duty alleged against the defendants, an act of negligence to which, and to which only, the plaintiff's injuries were attributable: in other words, that the plaintiff's own act was the proximate cause of the accident.

There was no express finding as to the negligence of the defendants, but no point was made of that on the argument, and the parties were evidently satisfied at the trial that the questions put to the jury and the learned Judge's charge would sufficiently draw their attention to the only ground on which the defendants' liability could be rested. The answers to the second and fourth questions read in connection with the charge are, therefore, sufficient to maintain the action, unless the defendants' contention that the plaintiff is to be regarded as entirely the author of his own injury is entitled to prevail.

On the argument that contention was necessarily pressed to the full extent, that conceding the defendants were in fault in not having given a sufficient time for their passengers to alight, the plaintiff's duty was to allow himself to be carried on to the next station, and then to have sought compensation for the delay and trouble caused him thereby, but that he had no right to attempt to alight from the train after it was started, and could not recover if he met with an injury while doing so, no matter how slowly the train may have been moving.

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This has been the subject of many conflicting decisions in the Courts of the neighbouring Republic, as may be seen by section 147 of the 3rd ed. of Beach on Contributory Negligence and the cases cited in the footnotes, and in vol. 4 of a compilation called American Negligence Cases; and although the point seems not to have directly arisen in the English Courts, observations are to be found in some of the decisions relied on by both parties not entirely consistent with each other.

It would serve no useful purpose to examine the American authorities at length, though I shall refer to some of those which support the view which, upon the English cases and our own, I think we must adopt. The result of the two lines of decision is stated in section 147 of Mr. Beach's book.

The proposition is that if the defendants were guilty of an act of negligence towards their passenger in starting their train without having given him the reasonable opportunity which it was their duty to afford him of alighting at his journey's end in the ordinary manner, they were bound to contemplate as a probable consequence of their omission that he would be likely to attempt to alight notwithstanding that the train was again in motion if the circumstances were such that to a reasonably careful and prudent man there would be no obvious, or but slight risk, of danger in so doing. The defendants must be taken to be familiar with the general practice in this respect, not only of their own servants but also of the general public, though I will not insist upon that. The proposition, as stated, appears to be the law, and shews that the proximate cause of the injury where the jury have passed upon the facts, as they have passed upon them here, is the negligence of the defendants and not of the plaintiff. The principle on which this depends is laid down in the case of *Clayards v. Dethick* (1848), 12 Q.B. 439. To quote from the headnote: "The defendant is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger. The amount of danger and the circumstances which led the plaintiff to incur it, are for the consideration of the jury." There the commissioners of sewers had made a dangerous trench in the only outlet from a mews, putting up no fence, and leaving only

a narrow passage, on which they heaped rubbish; and a cabman, in the exercise of his calling, attempted to lead his horse over the rubbish, and the horse fell and was killed. It was held that the plaintiff was not disentitled to recover because he had at some hazard, created by the defendant, brought his horse out of the stable. Patteson, J., at p. 446: "Now the defendants had clearly no right to leave a trench open in the passage to this mews without a proper fence, and, having done so, to tell the plaintiff, 'You shall keep your horse in the stable till we inform you that you may remove him.' But whether or not the plaintiff contributed to this mischief that happened by want of ordinary caution, is a question of degree. If the danger was so great that no sensible man would have incurred it, the verdict must be for the defendants: and the case was rightly put to the jury as depending on this question. . . The whole question was whether the danger was so obvious that the plaintiff could not with common prudence make the attempt."

On the same principle it cannot be laid down as a matter of law that the plaintiff in the case at bar was bound to yield to the situation the defendants had negligently created and submit to be carried away from his destination, and suffer loss and inconvenience, where, if the jury so found, he might reasonably expect to avoid it safely by getting off the train as and when he did. *Clayards v. Dethick* has been forcibly criticised by Lord Bramwell as being one in which the plaintiff ought to have been regarded as the author of his own wrong, but it has never been overruled, and in the most recent edition of Sir F. Pollock's book on Torts, 6th ed., p. 463, it is said that "principle and authority seem on the whole to support it;" and see also Smith on Negligence, there cited, p. 186, app. B., commenting on Lord Bramwell's remarks.

The case of *Connell v. Town of Prescott* (1892), 20 A. R. 49, affirmed in the Supreme Court (1893) in 22 S.C.R. 147, is also in principle an authority for the plaintiff. There the owner of some horses, frightened by stones thrown by a blast negligently set off by the defendants, ran out in front of them and endeavoured, without success, to stop them, and in trying to get away was injured. It was held that the negligent manner in which the blast was set off was the cause of the injury, and

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that the plaintiff had done no more than any reasonable man would have done under the circumstances. I refer particularly to the observations of Sedgwick, J., on pp. 159, 160-1-2-3.

Edgar v. The Northern R.W. Co., 11 A.R. 452, may also be cited. That was a case of invitation to alight, but it also involved the question whether, under all the circumstances, it was such an invitation as a reasonably careful man would have acted upon. See also a similar case, *Filer v. New York Central R.W. Co.*, 49 N.Y. 47.

There is a careful discussion of the question in the case of *Central R.W. and Banking Co. v. Miles*, 88 Ala., the facts of which are not unlike those of the present case.

It is only necessary to add that the evidence here was for the jury, and that it was amply sufficient to lead them to the conclusion that when the plaintiff attempted to alight as he did, there was nothing to indicate to a reasonably careful man that he was incurring any obvious danger. The station master's evidence that the train had then only moved about thirty feet, no doubt had its due weight with the jury.

As regards the damages, I cannot see any clear ground on which we can say that they are excessive.

I think the appeal should be dismissed.

MACLENNAN and GARROW, JJ.A. concurred.

G. F. H.

[IN THE COURT OF APPEAL.]

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Executors and Administrators—Evidence—Matters occurring before Death of Deceased—Corroboration—R.S.O. 1897, ch. 73, sec. 10—Devise to Executor—Whether in lieu of Compensation—Negligent Management—Compensation.

The executor of the estate of H. was also the executor of the estate of M., in which H. was beneficially interested. In passing his accounts as executor of another estate after H.'s death, the executor credited himself with having received for H. on account of her share in such last named estate a specified sum of money. On subsequently proving his accounts in the H. estate, and being charged with this sum, as having been received by him for the deceased, he claimed that he had not then received it, but had in fact paid it out in small sums to H. during her lifetime :—

Held, that this was not a matter occurring before the death of H., and therefore the evidence of the executor did not require to be corroborated under section 10 of the Evidence Act, R.S.O. 1897, ch. 73.

A testatrix by her will devised to her brother, naming him as such, certain lands free from incumbrances, with a direction for the payment out of her general personal estate of any incumbrance thereon, and she appointed him her executor, and provided for the appointment of a successor in such office, in case of a vacancy, without in such an event diverting the benefit from him :—

Held, that the devise was not given to him in his capacity as executor, but in his personal capacity, and did not preclude him from claiming compensation for his services to the estate.

Compton v. Bloxham (1845), 2 Coll. 201, distinguished.

The fact of an executor being guilty of acts of negligence, mismanagement and breach of trust in his management of the estate, there being nothing of a dishonest or fraudulent character, while the losses resulting therefrom were capable of being compensated for, and made good in money, does not deprive him of his right to compensation.

Hoover v. Wilson (1897), 24 A.R. 424, referred to.

THIS was an appeal from the judgment of Falconbridge, C.J.K.B., confirming the report of the local Master at Ottawa.

An action was brought by the plaintiff, Matilda Agnes McClenaghan, for the administration of two estates, namely, that of her mother, Victoria Elizabeth Hinton, and of her aunt, Matilda S. MacGillivray. The action was against George W. Perkins, the executor and trustee of both estates, and other parties interested, but the defendant Perkins is the only one whom it is now necessary to refer to.

There was a reference to the local Master at Ottawa to take the accounts and report thereon.

The defendant's accounts were accordingly brought in before the Master, to which surcharges and falsification sheets were filed.

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The only matters in the report now material were the following, namely, an item of \$1,275 in the plaintiff's surcharge.

The evidence shewed that the defendant was the executor of the estate of his father Lyman Perkins, and, as such executor, he passed his accounts in the Master's office in an action of *Armstrong v. Perkins*. In these accounts which were put in he credited himself, as executor of that estate, with certain payments made to himself as executor of Mrs. Hinton's estate in respect of her share in his father's estate—the Lyman Perkin's estate. One of these was an item of \$1,200, which was credited in the accounts filed in the *Armstrong v. Perkin's* suit, as paid to the estate of Mrs. Hinton on 30th April, 1883. The defendant's explanation of this was that he paid Mrs. Hinton \$1,275 in small sums prior to her death, and that he credited them only on the 30th April, 1883, after her death, which took place on 25th December, 1882, because he had not made them before. He said he had no vouchers for these payments, and the only documentary evidence he produced was a pocket diary shewing entries of them in his own handwriting under the respective dates. The Master held that his evidence related to a matter occurring before the death of the testatrix, and required to be corroborated under sec. 10 of the Witnesses and Evidence Act, R.S.O. 1897, ch. 73.

The Master, therefore, charged the executor with the said sum of \$1,275, as due by him to the testatrix Victoria Elizabeth Hinton, as the executor of Lyman Perkin's estate, and alleged by the executor to have been paid to her before her death, but which was credited to her by him in the accounts of the Lyman Perkins estate after the date of her death.

The other matter related to a devise to the defendant under the will of Matilda S. MacGillivray. This was a devise of certain lands "unto my brother George Washington Perkins, his heirs and assigns absolutely, for his and their sole and only use forever, free from all encumbrances," with a direction for the payment of a mortgage thereon, and any other encumbrance that might be on said land at the time of her death out of her personal estate, and that the payment of the encumbrance should be a first claim on her personal estate.

The Master found that the devise was given him in his capacity of executor, and intended as a compensation to him for his personal services in the management of the estate, and that he was not therefore entitled to any further sum by way of compensation out of that estate.

He allowed the executor \$1,900 as compensation for his personal services in the management of Mrs. Hinton's estate.

From this report the executor appealed to a Judge sitting in Weekly Court on the grounds that the executor should not have been charged with the \$1,275, as the evidence shewed such sum had not been received by him; and that notwithstanding the devise under the will of the said M. S. MacGillivray, he should have been allowed compensation for his services out of that estate.

There was a cross-appeal by the plaintiff on the ground that the \$1,900 allowed for compensation out of Mrs. Hinton's estate should not have been allowed.

On March 27th the appeal came on for argument before Falconbridge, C. J. sitting in the Weekly Court.

The learned Chief Justice confirmed the finding of the Master as to the \$1,275. He did not deal with the question as to whether the devise to the defendant was in lieu of compensation for his services as executor, being of the opinion that the defendant, by his careless management of the estate, was not entitled to any compensation at all.

The defendant appealed to the Court of Appeal.

On April 23rd the appeal was heard before OSLER, MACLENNAN, MOSS, and GARROW, JJ.A.

T. A. Beament, for the appellant. As to the \$1275 item, the appellant was entitled to shew that this amount had been paid out by him, and how it had been disposed of, and it was not necessary that his evidence should have been corroborated. Section 10 of the R.S.O. 1897, ch. 73 does not apply, as it was not an event occurring during the lifetime of the deceased: *Staebler v. Zimmerman* (1894), 21 O.R. 266. The defendant was entitled to claim compensation in the MacGillivray estate. The devise was made to him in his individual capacity and not as executor. The testatrix's intention was that he should be a beneficiary in

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any event. Unless this was so there would be a lapse under the clause in the will for the appointment of new trustees: he could resign his position as trustee, and the subject matter of the devise is not otherwise dealt with. The learned Chief Justice was of the opinion that it was not necessary to decide this point as he held that by reason of his alleged mismanagement he was not entitled to any compensation at all; and for the same reason he disallowed the \$1900 compensation allowed by the Master in the Hinton estate. The alleged grounds of mismanagement are not sufficient to disentitle the defendant altogether from getting compensation, while all these matters were duly considered by the Master in fixing the amount of compensation allowed by him. The defendant, therefore, should be allowed compensation out of both estates: *Archer v. Severn* (1886), 13 O.R. 316; *Hoover v. Wilson* (1897), 24 A.R. 424.

W. J. Code, for the respondents. The executor in bringing in his accounts in the Hinton estate admitted that this amount had been received by him as executor. The defendant admitted that the money was received by him during the lifetime, and his claim is that he paid it out to her during her lifetime. The matter, therefore, was one occurring before the death of the deceased, and came within sec. 10 of the R.S.O. 1897, ch. 73, and the Master was right in requiring corroboration of the defendant's evidence: *Re Curry, Curry v. Curry* (1900), 32 O.R. 150; *Taylor v. Regis* (1895), 26 O.R. 483. Then as to the devise under Mrs. MacGillivray's will. The devise itself and the whole context of the will shews that it was intended to include any compensation he might otherwise be entitled to for his care and services in administering the estate. The defendant, however, by his gross negligence and flagrant violation of his duties as trustee disentitled himself to claim any compensation at all, and therefore, as found by the learned Chief Justice, it was unnecessary to decide the point as to the effect of the devise; and for the same reason he also found he was not entitled to claim compensation in the Hinton estate, and therefore the finding of the Master fixing \$1900 was properly disallowed: *Williams on Executors*, 9th ed., p. 1147; *Boys Home v. Lewis*

(1901), 3 O.L.R. 208; *Denison v. Denison* (1870), 17 Gr. 306; *Re Appleton, Barber v. Tebbit* (1885), 29 Ch. D. 893.

December 5. OSLER, J.A.:—On the first ground of appeal the sole question is whether it was necessary that the defendant's evidence in answer to the item of \$1,275 in the surcharge should have been corroborated, or whether the Master was at liberty to act upon it if believed by him in the absence of corroboration, and to treat the surcharge in this respect as not proved.

If the language of sec. 10 of the Evidence Act and the precise question which the Master had to determine are attended to, I think it will clearly appear that the section does not apply:—"In any action or proceeding by or against the heirs, executors, administrators or assigns of a deceased person, the opposite or interested party to the action shall not obtain a verdict, judgment or decision therein in his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

The vital words of the section—those upon which in any given case its application hinges—are "in respect of any matter occurring before the death of the deceased person."

Now, the question before the Master was not whether the defendant's accounts, as executor of Lyman Perkins' estate were correct, nor whether he was a debtor to the estate of his sister, Mrs. Victoria Hinton, who died in December, 1882, in respect of money received by him for her in her lifetime, and not paid over to her or to her estate since her death, but whether the moneys, the subject of the surcharge, had come to his hands and been received by him in his capacity of her executor since her death. If the plaintiff could not prove that it had been received by him, as alleged, in his executorial capacity, the surcharge failed.

What the plaintiff relied upon was an alleged admission made by the defendant in passing his accounts before the Master in a partition or administration action of *Armstrong v. Perkins*, as executor of the estate of his father, one Lyman Perkins, in which he took and received credit for the sum now

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in question, as part of Mrs. Hinton's share or interest in that estate, as having been "paid to her estate," and thus received by himself as executor on the 30th April, 1883. In taking the accounts of the Perkins estate, it was, except as a matter of strict accuracy, immaterial at what time the money was paid, whether to Mrs. Hinton herself in her lifetime or to himself as her executor after her death, and the form in which credit was taken created no estoppel upon the defendant in the present action. The defendant denied that he had received this sum after Mrs. Hinton's death, as alleged by the plaintiff, and his evidence in that respect did not require to be corroborated, and he explained the alleged admission in his accounts in *Armstrong v. Perkins*, by saying that the item he had then taken credit for consisted of a number of small sums paid to Mrs. Hinton in her lifetime, as executor of Lyman Perkins, which he had not made or added up until the 30th July, 1883, when preparing his accounts, and therefore credited them as of that date. The question therefore being whether he had received the \$1,275 after Mrs. Hinton's death, viz., on the 30th April, 1883, it appears to me that the defendant was at liberty not only to prove by his uncorroborated denial, if the Master believed it, that he had not so received it, but also in the same way to explain or destroy the force of the alleged admission, the only evidence given by the plaintiff in support of the surcharge, by shewing why he had taken credit in the way he had in the accounts filed by him in the former suit. The matter for the Master to decide, therefore, being whether the defendant received this money as charged after Mrs. Hinton's death, and the only proof of that consisting of an alleged admission made by defendant since that time, I think the defendant's evidence was competent, even without corroboration, to shew the circumstances under which it was made and the reason for having made it in the form in which it appears, even although it may be necessary for the purpose of explanation to refer to matters which occurred before the death of the deceased, so long as these are not matters which directly come into judgment and form the subject of the decision in the present action.

With respect to the other grounds of appeal which relate to the question of the defendant's remuneration for the management of the Hinton and MacGillivray estates, I do not propose to add very much to what is said by my brother Maclellan. I agree that, reading the whole will, we cannot hold that the devise to the defendant in the will of Mrs. MacGillivray was intended to be in lieu of commission or other remuneration for executing the trusts of and managing the estate. The language of the devise points to family affection on the part of the testatrix as the motive which prompted it, and by another clause we see that she contemplated the possibility of the defendant's refusal to execute the trusts of the will, without indicating that in that event the beneficial devise was not to come into operation.

I think that the *ratio decidendi* of the case referred to by the learned Master—*Compton v. Bloxham* (1845), 2 Coll. 201—ought to have led him to the conclusion that any presumption in favour of the representative character of the devise was rebutted, and that the defendant was, apart from other circumstances, entitled to "such fair and reasonable allowance for his care, pains and trouble and his time expended in and about the trust estates" as may be thought proper.

As to the claim for this allowance, I have felt much pressed with the difficulty, created by the defendant's own conduct, of saying that he ought to have anything more than the very least sum which could be fixed upon as being more than merely nominal. He has not been fraudulent or dishonest, but he has been wasteful, careless and imprudent in a high degree.

It is hard to see in what respect the estate has derived any benefit from his management, and his success in respect of the matters involved in this appeal will still leave him a debtor—it is said an insolvent debtor—to it. I feel that under the circumstances it matters little what is allowed to him so long as the unfortunate beneficiaries are not ordered to pay him anything. His mismanagement has extended over a long series of years. He has expended, in a futile way, care, pains, time and trouble about it; and the amount, looked at as a per annum allowance, which the Master has given, is small. And for the other—the MacGillivray estate—it will, no doubt, not

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be very great. I concur, therefore, though reluctantly, with the judgment restoring the Master's finding as to the allowance for Hinton's estate. As to the other, and the item of the surcharge already dealt with, the appeal must also be allowed and the matters referred back to the Master for further consideration and report.

The appellant is entitled to the costs of the appeal, and also to the costs of the appeal before Falconbridge, C.J., as respects the items dealt with on the appeal to this Court.

MACLENNAN, J.A.:—The first item in question in this appeal is one of \$1,275.

The precise form in which this and other items were stated in the appellant's account in the administration proceedings of his father's estate in *Armstrong v. Perkins*, is not before us, although it was before the Master. What the Master says about it is this: "In the accounts filed in *Armstrong v. Perkins* there is an item of \$1,200 credited as paid to the estate of Victoria Elizabeth Hinton on the 30th of April, 1883." At that time the appellant was passing his accounts as executor of the estate of his father Lyman Perkins, and he was at the same time executor of his sister, Mrs. Hinton, who had died on the 25th of December, 1882. It seems to have been assumed by all parties that the item of \$1,200 was allowed to the appellant as executor of his father's estate. On taking the present accounts, and on being surcharged with this item of \$1,275, he explained it by saying the money was not received on the 30th of April, 1883, but was made up of several smaller payments made by him as executor of his father to his sister, Mrs. Hinton, in her lifetime, in the year 1882. The Master has not given effect to that evidence, and has charged the appellant with the item, on the ground that his evidence was in respect of a matter occurring before the death of the deceased, and was not corroborated as required by R.S.O. 1897, ch. 73, sec. 10. The learned Chief Justice has upheld that decision of the Master.

I am, with great respect, of opinion that the Master's ruling on the question of corroboration is wrong, and cannot be supported.

The question before him was whether the appellant had received the sum in question on the 30th of April, 1883, or at any time after Mrs. Hinton's death. If he did he was chargeable, but not otherwise. To my mind the matter is too plain for argument. The respondents say to the executor: "You received this sum of \$1,200 or \$1,275 on or about the 30th of April, 1883, or at all events some time after Mrs. Hinton's death, and after you became her executor; and that is apparent from your own admission in your account filed in *Armstrong v. Perkins*." He answers that by a denial. He says: "That admission requires explanation and qualification. I did not receive it on the 30th of April, 1883, or after my sister's death at all. It was the aggregate of several sums which I paid to my sister in her lifetime as my father's executor, and claimed and obtained credit for them as my father's executor, which I was entitled to do." It was not correct to say in his account that the item had been paid to the estate of Victoria Elizabeth Hinton, or to himself as executor of her estate, instead of saying it had been paid to her in her lifetime. But the important matter at that time was to get credit for it with his father's estate, as a payment by him on account of his sister's share. Whether it was paid in her lifetime or shortly afterwards was immaterial, and the error not an unnatural one to commit in preparing the accounts after Mrs. Hinton's death.

The matter in question before the Master was therefore, in my opinion, clearly not a "matter occurring before the death" of Mrs. Hinton, and so not one requiring corroboration under the statute.

This item must be referred back to the Master for reconsideration and determination.

The second ground of appeal is the finding of the Master, and on which the learned Chief Justice expressed no opinion, that the devise by Mrs. MacGillivray of certain land to the respondent, with a direction for the payment out of her personal estate of the encumbrance thereon, was made to him in his character of executor, and was an answer to his claim to an allowance for his care, pains and trouble and time expended as executor, under R.S.O. 1897, ch. 129, sec. 40. The learned Chief Justice held that the respondent's faults in the execution

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of his trust were sufficient to disentitle him to any compensation, and that it was not necessary to determine whether the devise was made to him in his quality of executor.

I have examined the numerous cases on this subject, and I am of opinion that on this point the Master came to a wrong conclusion.

The respondent was the testatrix's brother, and the first disposing paragraph of the will is the one in question. It is in this form: "I give and devise all and singular those certain parcels or tracts of land (describing them) unto my brother George Washington Perkins, his heirs and assigns absolutely, for his and their sole and only use forever, free from all encumbrances, and I hereby direct that the mortgage at present on said lands or any other encumbrances that may lie on said land at the time of my death shall be paid out of my personal estate, and the payment of the said encumbrance shall be a first claim on my said personal estate."

She then proceeds to dispose of the residue of her real estate, and her personal estate, in a number of subsequent paragraphs, for the benefit of her nephews and nieces and other objects. She next appoints "the said George Washington Perkins sole executor" of her will, and then follows the usual clause enabling "the said trustee hereby appointed, or any trustee or trustees to be appointed as hereinafter provided," in case of vacancy in the office, to appoint a successor or successors in the trust, and afterwards she gives the respondent the three portraits of her father, mother, and her late husband.

Now, taking this will as a whole, I think the presumption that the devise was intended as compensation to the executor is rebutted. In *Compton v. Bloxham*, 2 Coll. 201, it was held by Knight Bruce, then Vice-Chancellor, that the circumstance that the testator did not name Charles Bloxam in his will without calling him his brother, rebutted the presumption that the bequests made to him were made in his character of executor; and that case was referred to without disapproval by the Court of Appeal in *Re Appleton, Barber v. Tebbit*, 29 Ch. D. 893. Here the gift is to "*my brother* George Washington Perkins," and I think that is an indication of the testatrix's motive for her gift sufficient, having regard to the other parts

of the will, to rebut the general presumption. See also cases cited, Theobald on Wills, 5th ed., 318; Williams on Executors, 9th ed., p. 1147.

I therefore think that the question of compensation to the appellant as executor of Mrs. MacGillivray's estate is not excluded by the devise contained in the will.

The next question is that of compensation. The Master allowed the appellant compensation to the amount of \$1,900 out of the estate of Mrs. Hinton, but allowed nothing out of Mrs. MacGillivray's estate for the reason already mentioned. The learned Chief Justice held him not entitled out of either estate by reason of misconduct. He was of opinion that his acts of negligence, mismanagement, and breach of trust made a cumulative case quite sufficient to deprive the executor of the compensation provided by the statute.

The learned Chief Justice enumerates the neglects and defaults of the executor, and they are certainly not trifling or at all to be excused. Nevertheless, they are not the neglects or defaults of a dishonest or fraudulent trustee, and are all capable of being compensated, and the losses resulting from them capable of being made good in money. That being so, I think it is not a case for depriving him of compensation. The plaintiff has been executor of the Hinton estate for nineteen years, and of the MacGillivray estate for, I think, fourteen years. The aggregate amount of the money which came to his hands during that time was about \$72,000. It is evident that he must during that time have bestowed much care, pains, trouble, and time in connection with the business of both estates, and although the care and pains were not of the highest quality, yet his position under the statute was and is that of a person performing services on terms of fair and reasonable remuneration for care, pains, trouble and time. I think it is the effect of all the decisions on the statute that an executor or trustee is not to be deprived of compensation for actual and beneficial services, though he may also have been guilty of neglects and defaults more or less grave: *Hoover v. Wilson*, 24 A.R. 424. I think that to do so would be to punish him by depriving him of a statutory right, which the Court has no jurisdiction to do. He will be made to account

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for what he actually received, or must be presumed to have received, or ought to have received, but no more: *Attorney-General v. Alford* (1855), 4 DeG. M. & G. 841, 851; *Vyse v. Foster* (1872), L.R. 8 Ch. 309, 333, (1874), L.R. 7 H.L. 318; *Exp. Ogle* (1873), L.R. 8 Ch. 711, 716. The Master has charged him with all the losses to the estate resulting from his neglects and defaults, and has allowed him a compensation of \$100 per annum from the Hinton estate, which seems a moderate sum.

It follows that the executor's appeals in respect of his compensation should be allowed as to both estates, and it will be referred back to the Master to fix a proper amount in the MacGillivray estate.

The appeal will be allowed with costs.

MOSS, and GARROW, J.J.A., concurred.

G. F. H.

[IN THE COURT OF APPEAL.]

THE GRAND HOTEL COMPANY OF CALEDONIA, LIMITED,

v.

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THE SAME COMPANY

v.

TUNE.

*Trade Mark—Infringement of—"Caledonia Water"—Caledonia Mineral Water
—"Water from New Springs at Caledonia."*

The plaintiffs for many years had been the owners of mineral springs in the township of Caledonia, the waters of which they had caused to be registered under certain trade marks, and the names "Caledonia Water" and "Caledonia Mineral Water." The water, which was used medicinally and as a beverage had, through the plaintiffs' exertions and the expenditure of large sums of money, become very widely known as water from Caledonia springs. Around the springs a village, laid out on the ground many years ago, came into existence, and some years ago the plaintiffs erected a hotel, and procured a railway station and post office to be located there under the name "Caledonia Springs." In 1898 L. & Co., who had purchased a lot about a quarter of a mile from the plaintiffs' place, had, by sinking an artesian well, tapped springs, from which water flowed similar in some respects to the plaintiffs', which they supplied in barrels to their agents as "water from the new springs at Caledonia," which these agents bottled and sold. The bottles used were similar in shape and size to the plaintiffs'. One of the agents, T. & Co., had, at the time of the commencement of the action, been using labels thereon resembling the plaintiffs', and selling the water as Caledonia water, but this had never been sanctioned by L. & Co., and was at once abandoned.

Held, Moss, C.J.O., dissenting, that the defendants could not be restrained from using the word "Caledonia" as they did in designating the water sold by them, and that the injunction granted herein should be dissolved with costs, except as to T. & Co.

THESE were appeals by the defendants from the judgment of Boyd, C., reported in 2 O.L.R. 322, where the facts are set out.

On November 21st and 22nd, 1901, the appeals were argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., when judgment was reserved.

J. J. Maclaren, K.C., and *W. E. Middleton*, for the appellants.

Walter Cassels, K.C., and *F. Arnoldi*, K.C., for the respondents.

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In consequence of the death of LISTER, J.A., and the appointment of ARMOUR, C.J.O., to the Supreme Court of Canada, the case was directed to be re-argued.

On December 4th, 1902, before MOSS, C.J.O., OSLER, and MACLENNAN, JJ.A., the appeals were re-argued.

W. E. Middleton, for the appellants.

F. Arnoldi, K.C., for the respondents.

December 4. MOSS, C.J.O.:—I am of opinion that the judgment appealed from should be affirmed.

I see no good reason for interfering with the learned Chancellor's conclusions of fact, which are, I think, well supported by the testimony.

Many years before the defendants began the production or sale of mineral waters from the neighbourhood of the plaintiffs' springs in the township of Caledonia, the waters derived from the plaintiffs' springs had gained a reputation and acquired an established market as "Caledonia Water," not because they were so named by the early proprietors, but because they grew into favour and came to be known to dealers and consumers by that name. The name gradually became attached to and connected with the plaintiffs' waters, and was understood to designate those which the proprietors of the springs supplied to their customers. This had become so complete and certain before the defendants put any water on the market that anyone hearing the term "Caledonia Water" would instantly conclude that it referred to the plaintiffs' waters.

All this was well known to the defendants when they began making their arrangements for bringing their water before the public and placing it in the market.

The question seems to me to be largely, if not altogether, one of fact, whether the defendants have so dealt with their waters as to lead consumers to the belief that they were selling the plaintiffs' waters, which were well known to the trade and general public as "Caledonia Water."

The only distinction between such cases as *Wotherspoon v. Currie* (1872), L. R. 5 H.L. 508; *Montgomery v. Thompson*, [1891] A.C. 217; and *Reddaway v. Banham*, [1896] A.C. 199,

and this case, that can be suggested, is that they related to manufactured articles, whereas this case relates to a natural product. No such distinction appears to have been recognized in *Radde v. Norman* (1872), L.R. 14 Eq. 348, or *Appolinaris Co. (Limited) v. Norrish* (1875), 33 L.T.N.S. 242, in both of which *Wotherspoon v. Currie* was relied upon for the plaintiffs. The plaintiffs' waters are not natural products from sources available to all the world, nor found in many places within a certain district.

The defendants claim that their waters are different from the plaintiffs in chemical ingredients, and not only different but superior on account of the differences. For all that appears, the plaintiffs have the exclusive access to the sources whence are derived waters possessed of the qualities they claim for theirs. And I see no good reason why the principle of the above mentioned cases should not apply to this case. It is peculiar and special in its facts and circumstances, and may well be classed with them.

The defendants contend that, even admitting that the plaintiffs have shewn themselves entitled to the use of the words "Caledonia Water," as designating their waters, the use by the defendants of the words, "water from the new springs at Caledonia," clearly distinguishes their waters from the plaintiffs' waters.

I am unable to adopt that view. In the designation of the plaintiffs' waters, "Caledonia" is the dominating factor—the word which conveys to the consumer the idea of the waters supplied by the plaintiffs. And the question of the particular springs whence they are derived would scarcely present itself to his mind. To say that the waters are from the new springs at Caledonia is not to inform him that they are not the plaintiffs' waters. Unless he has special information as to the history of the plaintiffs' springs he will not see any distinguishing mark in the mention of the new springs, which may well suggest, or be taken to indicate, new springs of the plaintiffs' waters.

The words convey the idea of Caledonia waters, and suggest the well-known waters supplied by the plaintiffs.

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It is not easy to explain why the defendants use the words "at Caledonia," unless for the purpose of gaining the advantage to be derived from the reputation of the plaintiffs' waters. The defendants' waters could just as well have been put on the market—and if they have intrinsic merit, gain popular favour—under some other name. Being, as they are, chemically different from any of the plaintiffs' waters, the word "Caledonia" suggests no special attribute or quality common to the waters from the township or locality. And, so far as the defendants' waters are concerned, there is nothing in the name "Caledonia" except an advantage from the reputation of the plaintiffs' Caledonia waters.

It is argued that the words "Caledonia Water" mean nothing more than waters obtained in the township of Caledonia, and that any person having mineral waters obtained at or in that township is entitled to use the word "Caledonia" in designating them. But that argument does not hold in view of the secondary meaning to be attached in this case to the words as denoting the plaintiffs' waters. Where the secondary meaning has been acquired, the defendants cannot justify themselves by the statement that they are telling the simple truth.

In *Reddaway v. Banham*, *supra*, Lord Herschell thus dealt with the argument, at p. 212: "I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true."

In the same case Lord Macnaghten said, at p. 219: "I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it."

To my mind the words employed by the defendants to designate their waters, so far from clearly distinguishing them from the plaintiffs' product, appear calculated to mislead and to induce the public to suppose that what the defendants are vending comes from the plaintiffs' springs.

I think, therefore, the plaintiffs are entitled to an injunction. But I also think that the injunction awarded is not in the form now usually accepted as the proper one in cases of this kind. It should be to restrain the defendants, their servants and agents, from selling or offering, or exposing or advertising for sale, or procuring or enabling to be sold, any mineral waters (not being of the plaintiffs' production) under or in connection with the word "Caledonia" without clearly distinguishing such waters from the plaintiffs' waters.

The precise language of the injunction may be discussed (if any question arises concerning it) at the instance of any party.

With this modification I think the judgment should be affirmed, and the appeal dismissed with costs.

Since the argument of this case two decisions have been reported which appear to assist the plaintiffs' case. I refer to *Worcester v. Locke* (1902), 18 Times L. R. 712, and *Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal* (1902), 32 S.C.R. 315.

MACLENNAN, J.A.:—After a very careful perusal and consideration of the oral and other evidence in this case, I have arrived at a different conclusion from that of the Chancellor.

In the beginning of last century mineral springs were discovered quite near each other in lot number twenty in the first concession of the township of Caledonia, in the county of Prescott. The waters from these springs were all found to possess medicinal qualities, though differing considerably from each other in their component elements. These springs soon became known by the name Caledonia Springs, and have ever since retained that name. They also became a place of resort by invalids, and the water therefrom has, for a long time, been a subject of merchandise by the proprietors by the name of "Caledonia Water."

As early as the year 1839, as appears by the abstract of title put in by the plaintiffs, the neighbourhood of the springs was divided into village lots, with streets and squares; there being as many as seventeen different streets mentioned in the abstract. Ever since that time the locality of the springs, as

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well as the springs themselves, has been called and known by the name of "Caledonia Springs."

In the year 1866 a company was incorporated called "The Caledonia Springs Hotel Co.," for the purpose of building and maintaining a hotel, and their charter declares that the company's place of operation is "the landed property in the township of Prescott, called and known as the Caledonia Springs property." That company built a hotel and carried on the hotel business; and, in the year 1876, the plaintiff company was incorporated for the purpose of acquiring the land on which the springs and the Caledonia Springs hotel are situate, and for carrying on a hotel business, and the business of selling mineral waters. The plaintiff company accordingly acquired the said property, including the hotel, and have carried on the hotel business and the business of selling mineral waters ever since.

Several years ago the plaintiff company induced a railway company to construct a line of railway to pass near the springs, affording communication by rail with Montreal and Ottawa, and the railway company has ever since maintained a station on its line at or near the springs, called "Caledonia Springs." For many years, also, a post office has been maintained at the plaintiffs' hotel by the Government of Canada, called "Caledonia Springs."

In the year 1898 the defendants Lyell, McDonell & Trenholm, whom it will be convenient to call Lyell & Co., became the owners, as tenants in common, of part of the east half of lot 21 in the township of Caledonia, which lies adjacent to the plaintiffs' land and to their hotel and springs, and by boring thereon they discovered two springs of mineral water, having medicinal qualities and composed of many of the ingredients composing the water produced by the plaintiffs' springs. These springs of the defendants, although only discovered by boring, are flowing springs like those of the plaintiffs, and the defendants Lyell & Co. have engaged in the business of selling the water therefrom for profit.

The plaintiffs commenced these actions on the 5th of February, 1901, for an injunction and damages, alleging that the defendants Lyell & Co. as principals, and the other defendants

as their agents, have been, in carrying on their business, infringing the plaintiffs' trade-marks, and selling their water as the plaintiffs' water to the great injury of the plaintiffs.

The actions were consolidated, and were tried before the learned Chancellor, who decided the case in favour of the plaintiffs.

The judgment restrains the defendants: (1) From advertising or selling their water in the Province of Ontario under the name of "Caledonia Water;" (2) or as coming from the springs owned or leased by the plaintiffs; (3) or enclosed in any bottles, barrels or packages having any mark or label contrived to represent their water as coming from the plaintiffs' springs; (4) and, particularly, from using or applying in Ontario to the defendants' water the words "Caledonia Water," "water from Caledonia Springs," "water from the new springs at Caledonia;" and (5) from so using and applying in the Province of Ontario any name or title of which the word "Caledonia" forms a part, in a way calculated to deceive the public into the belief that the water sold by the defendants is mineral water from the plaintiffs' springs.

There is also a reference as to damages.

The facts appear to be as follows: The defendants Lyell & Co., finding by analysis that their water contained valuable medicinal properties, opened a correspondence with the defendants Wilson, at Toronto, and the defendants Tune & Co., at London, and employed them respectively as agents for the sale of the water from their wells or springs. The defendants Wilson and Tune & Co. having received from their principals consignments of water in barrels from their springs, began the sale thereof in bottles, specimens of which, with the labels used affixed thereto, have been produced in evidence.

The plaintiffs' waters have usually been put on the market in a similar way. They supply agents in Quebec and Ontario with water in barrels. The agents bottle and sell it to the dealers. The plaintiffs' agents in Ontario are McLachlin & Co., of Toronto. The bottles used by Wilson and Tune & Co. are similar in size and shape to those used by McLachlin.

The plaintiffs claimed in their statement of claim that the defendants had infringed five different trade-marks used by

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them to distinguish their goods. It is proved that for a short time before, and at the time the action was commenced, the defendants Tune & Co. used a label upon their bottles which in shape and colour and several other respects resembled one of the plaintiffs' trade-marks, whereby a consumer, but I think not a dealer, might be deceived. This label had not been sanctioned by Lyell & Co., and was at once abandoned when complaint was made, and another was adopted to which no objection could be made. The defendants Wilson never used a label which could be regarded as an infringement of any of the plaintiffs' trade-marks. The learned Chancellor has, therefore, found that with the exception of what was done by Tune & Co. there was no infringement of the plaintiffs' trade-marks, and in that conclusion I agree. It was said, however, that the defendants had been selling their water as "Caledonia Water" without distinguishing it from the plaintiffs' water. The defendant Tune admits that he did sell some of the defendants' water as *Caledonia Water*, and that without any label or anything to distinguish it from the plaintiffs' water. This was just prior to the commencement of the action on the 5th of February, 1901. On the previous day the plaintiffs' solicitors wrote to Tune & Co., threatening proceedings, to restrain the use of a label with the words, "From the new springs at Caledonia, selzer beaver brand, natural saline water," as an infringement of plaintiffs' trade-mark, and claiming exclusive right to use the words *Caledonia* and *Caledonia Springs* in connection with their mineral waters. The service of the writ followed immediately, and on the 6th February, Tune & Co. answered the solicitors' letter, saying they were ignorant of the plaintiffs' claim to the word "Caledonia," and did not intend to imitate their trade-mark, and they offered to cease using the label objected to, and to re-label all the "new Caledonia springs water" with a label no one could mistake for the plaintiffs' label. This fair and reasonable proposal was not regarded as satisfactory, and those defendants were informed that they must submit to the relief asked for, and pay the costs, otherwise proceedings would not be stayed.

The Wilsons do not appear to have at any time used a label which could be regarded as an imitation of the plaintiffs' marks

or any of them, or to have sold any water merely as Caledonia Water. Their label is very different from any of the plaintiffs' labels in colour and size and device, and has nothing thereon of which the plaintiffs could complain, unless it be the word Caledonia as part of the phrase, "From the new springs at *Caledonia*." So far as Tune & Co. are concerned, I think their appeal fails as to that part of the judgment which enjoins them from selling their water as Caledonia Water. On reading the correspondence between Tune & Co. and their principals, Lyell & Co., and the evidence at the trial, it is quite clear the latter are not responsible for the act of their agent in selling their water as Caledonia Water without distinguishing it from the plaintiffs' water. On the contrary, Lyell & Co. distinctly cautioned them not to use a label which would infringe upon any other water in the market. The first member of the mandatory part of the judgment must, therefore, be allowed to stand against Tune & Co. But I think it ought not to stand against any of the other defendants. There is no evidence that they or any of them sold, or desired or intended to sell, their water as or under the name of *Caledonia Water*, or that any of the defendants, Tune & Co. included, intended or desired to lead their customers to suppose that they were getting water which came from the plaintiffs' springs. If any intention of that kind had been shewn, it would have been proper to make the injunction wide enough so as effectually to prevent such a fraud. But where no wrong was intended, an injunction should be confined to the precise act committed.

For the same reason, I think the second, third and fourth members of the mandatory part of the decree objectionable, and that they should be struck out. There is no evidence that any of the defendants, except Tune & Co., as already mentioned, advertised or sold their water as coming from the springs owned or leased by the plaintiffs; or inclosed in any bottles, barrels or packages having any mark or label, contrived to represent their water as coming from the plaintiffs' springs; or used or applied in Ontario to the defendants' water the words "Caledonia Water," or "water from Caledonia Springs."

They have used the last phrase mentioned in the fourth member of the injunction, namely, "water from the new

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springs at Caledonia," as descriptive of their water, and they justify their doing so; and the question is whether they are right.

The learned Chancellor thought that it was not correct for the defendants to speak of the water sold by them as from "new springs," because it was reached by means of boring and drilling, and rises from an artesian well, while the plaintiffs' water issues naturally from the earth, and is and has long been the spontaneous outflow of mineral springs. I am unable to take that view. As we have seen, the defendants' wells are flowing wells. The water springs up spontaneously from the earth through the orifices drilled or bored by the defendants. One of the definitions given in both the Standard and Century Dictionaries of a well is a *spring* or *well spring*, a *spring* of water, a fountain. The Century says: "A spring is a place where water comes naturally to the surface of the ground and flows away. A spring may be opened or struck in excavating, but cannot be made." I confess I should have thought the word *spring* the natural and appropriate word to use in order to designate the flowing wells of the defendants. I am, therefore, of opinion that the defendants do no more than exercise their legal right in designating and describing their wells as springs.

The learned Chancellor also finds fault with the use by the defendants of the word *Caledonia*. The defendants describe their water as from "the new springs at Caledonia." Their springs are within a quarter of a mile or less from the old springs, within a stone's throw of the village called Caledonia Springs, near a railway station and a post office of the same name. Now, the defendants have an undoubted right to describe their water correctly and truthfully. It is a saline mineral water. It is derived from new springs, and those springs are in the township of Caledonia, and they are at a place called "Caledonia Springs." If the defendants' water is likely to be more sought after and more marketable, and if the business of selling it is likely to be more profitable by reason of the situation of the springs, and their nearness to the famous old springs, the defendants are entitled to the benefit of that. They might say, in so many words, that they were situate

within so many yards of the old springs, just in order to gain favour in the market. The learned Chancellor also thinks there is inaccuracy in saying "new springs *at* Caledonia," instead of *in* Caledonia. They might have said with perfect correctness "new springs at Caledonia Springs," for the phrase "Caledonia Springs" unquestionably means not only the springs of water, but the place, the locality, the neighbourhood where they are situate. The defendant McDougall lives and keeps a hotel there. The first question put to him by the plaintiffs' counsel on his examination for discovery, was: "You live at Caledonia Springs? Ans. Yes." If a crime were committed at or near the defendants' springs, the indictment would charge that it was committed *at* the township of Caledonia, and not *in* the township. Therefore, the defendants' description of their water as water from "the new springs at Caledonia," is, in my opinion, a perfectly true and accurate description, and not only so, but one which clearly and sufficiently distinguishes it from the plaintiffs' water. There might have been some danger of confusion if they had said "the new springs at Caledonia Springs," although that would have been a true description; but they perhaps wisely avoided that.

It was very strenuously contended that the defendants have no right to use the word *Caledonia* at all in designating their water. A similar contention was made in *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15. At p. 27 Lord Selborne says: "For that argument no authority was cited; and it cannot, in my opinion, be maintained on any principle. . . If the defendant has (and it is not denied that he has) a right to make and sell in competition with the plaintiffs articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct and unequivocal way." And at pp. 37, 38, Lord Blackburn uses similar language; and Lord Watson at pp. 38, 39. Therefore, the defendants' springs being at Caledonia, they have a right to say so, taking care to distinguish them from those of the plaintiffs at the same place.

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It was also contended that the make up of the defendants' goods was calculated to deceive the public, because the bottles used were similar. But it was not shewn that the plaintiffs' bottles were in any way peculiar in form or size or colour, or different from bottles in common use for the sale of other waters. It was said that it was common to put such goods on ice, and that the labels then came off, and the customer might be deceived, but it is not shewn that the defendants did things of that kind. As to this contention, see observations of Lords Macnaghten and Davey in *Payton v. Snelling*, [1901] A.C. 308.

I am, therefore, of opinion that the whole of the fourth member of the injunction is unwarranted.

It remains to consider the fifth element, and it follows from what I have said, that, in my opinion, no part of it can be maintained as against any of the defendants. None of the defendants, except Tune & Co., have been shewn to have done anything that is here enjoined, and that part of the judgment which I think ought to stand against Tune & Co. is sufficient as against them.

The result is that as to all the defendants, except Tune & Co., the appeal should be allowed with costs, and the action should be dismissed with costs. As to Tune & Co., the appeal should be allowed, except as to the first clause of the injunction; and the reference as to damages, if the plaintiffs think it worth while. As against them the action was rightly enough brought. I think, however, if the plaintiffs had asked no more than that, Tune & Co. would have contested the matter no further. I think the plaintiffs should have against Tune & Co. such costs as they would have incurred in entering up judgment against them by default for so much of the injunction as they still retain, and I think they should pay them the rest of the costs of the action and appeal, with set off.

OSLER, J.A., concurred with MACLENNAN, J.A.

G. F. H.

[IN CHAMBERS.]

RE NAYLOR.

1902

Dec. 11.

Church — Religious Institutions — “Acquisition” of Land — Life Estate — Seven Years Holding—When Commencing—R.S.O. 1877, ch. 216, sec. 19—R.S.O. 1897, ch. 307, sec. 24.

The seven years during which a religious institution may hold land after its “acquisition” under section 19 of R.S.O. 1877, ch. 216 (now section 24 of R.S.O. 1897, ch. 307) does not commence to run in the case of a devise of a reversion dependent upon a life estate until the expiry of the life estate.

THIS was a motion by the executors of one Samuel Naylor, deceased, to have the validity of a devise in his will to a religious institution determined.

The matter came up by way of originating notice, and was heard in Chambers on the 8th of December, 1902, before BOYD, C.

It appeared that Samuel Naylor, who died on the 6th of April, 1880, had by his will, dated the 12th of August, 1879, devised his residence and sixteen acres of land to his wife Elizabeth Naylor for life, and after her decease to Ann Millson and Ebenezer Millson, during the lives of both and the life of the survivor, and upon the death of the survivor he directed that his trustees under his will should convey the residence and land to the “Circuit Stewards of the Welcome Bible Christian Circuit, and the said Circuit Stewards to hold the said premises free from encumbrance, and shall pay the annual income from the said residence and land annually to the Quarterly Board of the said Bible Christian Circuit forever.” The surviving life tenant died in the year 1901.

Evidence was adduced to shew that the Bible Christians were united under the name of the Methodist Church by 47 Vict. ch. 88 (O.), and 47 Vict. ch. 106 (D.), particularly sec. 5, and of the fact that the annual value or income of the property did not exceed \$150, that the terms “Quarterly Board,” “Stewards” and “Circuit” as used by the Bible Christian Church corresponded to the Quarterly Board, Stewards and

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Circuit of the Methodist Church, and their offices and duties were practically the same.

W. E. Middleton, for the executors. The question to be decided is what is the effect of the Act respecting the property of Religious Institutions, R.S.O. 1877, ch. 216, sec. 19, now R.S.O. 1897, ch. 307, sec. 24. If the devise to the Circuit Stewards took effect when the testator died, the land should have been sold within seven years, and not having been so sold it reverted to the heirs of the testator: *Reid v. Reid* (1886), 31 Ch. D. 402. If that is not so, there is a perpetual trust, void under the authority of *Carne v. Long* (1860), 2 D. F. & J. 75; *Re The Trusts of the Will of Thomas Dutton* (1878), 4 Ex. D. 54; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381, at p. 394; *In re Clarke, Clarke v. Clarke*, [1901] 2 Ch. 110; and *In re Amos, Carrier v. Price*, [1891] 3 Ch. 159. If the devise is charitable it is void under the Mortmain Act of 1736, 9 Geo. II., ch. 36, not being immediate: *In re Delany, Conoley v. Quick*, [1902] 2 Ch. 642.

W. F. Kerr, for the Methodist Church, claimed through the Bible Christians under 47 Vict. ch. 88 (O.), and 47 Vict. ch. 106, sec. 5 (D.), which transferred the property to the new corporation: *Tyrrell v. Senior* (1893), 20 A.R. 156; *Sills v. Warner* (1896), 27 O.R. 266. The Methodist Church did not acquire the land at the death of the testator, but at the death of the last surviving life tenant, who died in November, 1901. Its "acquisition" only dated from that time: *Attorney-General v. Lord Hotham* (1823), T. & R. 209; *Attorney-General v. Webster* (1875), L.R. 20 Eq. 483. Dissenters are, as regards bequests for charitable purposes, on the same footing as the Established Church: 1 Wm. and M., ch. 18; 2 & 3 Wm. IV., ch. 115; *Attorney-General v. Pearson* (1817), 3 Mer. 353. When there is an absolute gift, subsequent qualifications which are void for remoteness will be rejected: *Carver v. Bowles* (1831), 2 R. & M. 301; *Ring v. Hardwick* (1840), 2 Beav. 352; *In re Hume, Forbes v. Hume*, [1895] 1 Ch. 422, at pp. 427, 434; *In re Bridger, Brompton Hospital for Consumptives v. Lewis*, [1893] 1 Ch. 44. Permission to take by devise was given in 1851: *Smith v. The Methodist Church* (1888), 16 O.R.

199, at pp. 202, 203; and to hold in mortmain without letters of license, but under 9 Geo. II., ch. 36, there was only power to take by death. The following cases were also cited: *The Church Society of the Diocese of Toronto v. Crandell* (1860), 8 Gr. 34; *Becher v. Woods* (1865), 16 C.P. 29; *Perring v. Trail* (1874), L.R. 18 Eq. 88, at p. 91; *The London and Canadian Loan and Agency Co. v. Graham* (1888), 16 O.R. 329, at pp. 333 and 334; *Butland v. Gillespie* (1888), 16 O.R. 486, at p. 489.

No one appeared for those adverse in interest to the Methodist Church, although notified.

December 11. *BOYD, C.*:—This will was made more than six months before the testator's death, and is valid under R.S.O. 1877, ch. 216, sec. 19.

The devise was to the Society of Christians named, after the expiry of life estates: and the title in remainder to the Society first arose in 1901.

That is the period of the "acquisition" of the land within the meaning of section 12, and they may hold it for seven years thereafter.

It does not appear needful to consider the various cases cited and points urged, in view of this clause of the statute covering the present devise.

Costs out of estate.

G. A. B.

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[IN CHAMBERS.]

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IN RE HOLDEN.

Jan. 7.

Will—Construction—Speaking from the Death—R.S.O. 1897, ch. 128, sec. 26, sub-sec. 1 — Generic Bequest — “Now” — “Stock and Trade” — Omission of Words of Donation.

A testator provided as follows, “I give, devise and bequeath all my real and personal estate of which I may die possessed or interested in, in the manner following, that is to say, first, I give to my sister the house and land with all household furniture and all the stock and trade now in house and out of house with all book accounts now due me wherever found for her own use and benefit forever, and out of this . . . she shall \$100 lawful money of Canada to my brother for his own use and benefit forever” :—

Held, that although the gifts of the household furniture and the stock-in-trade and book debts were specific bequests, yet being specific bequests of that which is generic,—of that which may be increased or diminished,—the household furniture, including a number of books, stock-in-trade, and book debts as they existed at the time of the testator’s death, passed to the devisee, and the use of the word “now” did not limit the gift to them as they existed at the date of the will.

Held, also, that money of the testator on deposit in the bank, cash in hand, and certain promissory notes given in settlement of book debts, and a quantity of cordwood for use in the shop and dwelling house, two horses, harness and vehicles, were embraced in the gift of the “stock and trade.”

Held, further, that the brother was entitled to the legacy of \$100, notwithstanding the omission of the word “pay” after the word “shall.”

THIS was an originating notice for the construction of a will, particulars of which are set out in the judgment, and was argued on May 19th, 1902, before MEREDITH, C.J.C.P., in Chambers.

W. T. Allen, for Eliza Jane Isaac, the administratrix with the will annexed, and beneficiary under the will.

J. Birnie, K.C., for Benjamin F. Holden.

G. W. Bruce, for William Jonas Holden.

May v. Logie (1896-7), 27 O.R. 501, 22 A.R. 785, 27 S.C.R. 443, and the cases cited therein, were referred to on the argument, with the passages from Jarman and Theobald on Wills mentioned in the judgment.

January 7. MEREDITH, C.J.:—Originating notice for the purpose of having determined what is the true construction of the will of the testator, Samuel Otis Holden.

The will, which was apparently written by the testator himself, is as follows :—

"This is the last Will and testament of me Samuel Otis Holden of the Village of Nottawa grocer in the county of Simcoe and Province of Ontario made this

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in the year of our lord One thousand eight hundred and nintey one. I revoke all former Wills or other testamentary Dispositions By me at any time heretofore made and Declare this to Be my last Will and testament I Direct all my just Debts furnel and testamentry Expences to Be Paid satisfied By my Execut hereinafter named as soon as convently after my Decease

I Give Devise Bequeath all my Real and Personal Estate of Witch I may die Possessed of or interested in in the manner following that is to say first I give to my sister Eliza Jane Isaac the House and land With all Household furniture and all the Stock and trade now in house and out of house With all Book Accounts now Due me Wherever found for her own use and Benefit for ever and out of this She shall Pay to my Brother Benjamin Farnsworth Holden One hundred Dollars Lawfull mony of Canada for his own use and Benifit allso she shall One hundred Dollars lawful mony of Canada to my Brother William Jonas Holden for his Own use and Benifit for ever

and I Nominatee and appoint

to Be Execute of this my

last Will and Testament in Witness Whereof I have hereunto Set my hand the Day and year first above Written."

One can have little doubt that it was the intention of the testator to leave to his sister everything of which he should die possessed, subject to the payment of the two legacies of one hundred dollars each to his two brothers, but the question I am called upon to decide is whether the language he has employed in which to convey his wishes in this respect is sufficient to permit effect to be given to that intention.

The testator was at the time of his death, and also when the will was made, the keeper of a country village shop, and his possessions consisted of a house and lot, with out-buildings, where he carried on his business and lived. The capital employed in his business included his stock of goods and what was owing to him by his customers, and his household and

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other effects, consisting of furniture, books, horses, harness, carriages and sleighs, the whole amounting in value to between \$1,500 and \$1,600.

The disputes which have arisen have occurred owing to the fact that the testator, shortly after he made his will, sold his house and lot and his business, and afterwards repurchased them, and to what is alleged to be the insufficiency of the language of the will to include in the property bequeathed to his sister parts of the personal property owned by the testator at the time of his death.

According to the provisions of sub-sec. 1 of sec. 26 of the Wills Act (R.S.O. 1897, ch. 128):—"Every will shall be construed with reference to the real and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention appears by the will."

It must be conceded, I think, that what were specific bequests before the Act are still specific, and therefore that the gifts of the household furniture, the stock in trade, and the book-debts, are specific bequests. Nevertheless, being specific gifts of that which is generic, of that which may be increased or diminished, the effect of the new law, unless a contrary intention appears by the will, is, to use the language of the Master of the Rolls in *Bothamley v. Sherson* (1875), L.R. 20 Eq. 304, at pp. 312-3, "to bring down the specific bequest to the date of the death"—in other words, the new law makes a specific bequest of "my furniture" to mean not "the furniture which belongs to me at the time of making this my will," but "the furniture which shall belong to me at the time of my death." See also *Goodlad v. Burnett* (1855), 1 K. & J. 341.

It was argued, however, that the use of the word "now" as applied by the testator to the stock in trade and the book-debts shews a contrary intention within the meaning of sub-sec. 1 of sec. 26, and that these bequests are therefore limited to the stock in trade and the book-debts which belonged to the testator when the will was made.

According to the view of Mr. Theobald, wherever the word "now" is used in the description of property, it refers to the date of the will, and if it is an essential part of the description

it limits the gift to property then belonging to the testator: Meredith, C.J.
Theobald on Wills, 5th ed., pp. 114-115.

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The editors of Jarman on Wills do not appear to give so great an effect to the use of the word "now," and in their view it is not of itself sufficient to so limit the gift, and something more than that single word, at least in the case of a general gift, will generally be wanted for that purpose, and the word "now," they say, has never been so construed since the Act as to produce intestacy: Jarman on Wills, 5th ed., pp. 298-9.

It is unnecessary to express an opinion as to which of these views is the correct one, for I take it to be beyond question that though the testator has used the word "now," it may be apparent from the whole tenor of his will that he does not intend by the use of it to limit his gift to property owned by him at the date of his will, and that, I think, does appear by the will of this testator. See *Hatton v. Bertram* (1887), 13 O.R. 766.

It is, in the first place, I think, highly improbable, having regard to the subject-matter of the gift, that the testator intended to limit it to the stock in trade and book-debts belonging to him at the date of the will. It was a gift of something the constituents of which were changing from day to day and even from hour to hour, and the same reasons which led to the decisions to which I have referred as to the effect of the new law on bequests of that which is generic, seem to me to apply in some degree at least to prevent, if it can be avoided, such effect from being given to the word "now" in this case as would limit the gift to the very stock in trade and book-debts which belonged to the testator at the time when he made his will.

Then it is to be noticed that the testator sets out with this declaration: "I give, devise and bequeath all my real and personal estate of which I may die possessed of or interested in, in the manner following, that is to say."

The language of the gift itself being, as I think it is, ambiguous, this part of the will may, in my opinion, be used to explain the intention of the testator, and to negative an intention on his part to limit the subject of the gift to property belonging to him when the will was made.

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Somewhat similar words have been held not to be sufficient to pass property of a testator which was not embraced in the dispositions made in the subsequent parts of the will: *Wylie v. Enohin* (1860), 8 W.R. 316; 1 D. F. & J. 410; *S.C., sub nom. Enohin v. Wylie* (1862), 10 W.R. 467, 10 H.L.C. 1; but in that case the language of the subsequent provision of the will was unambiguous, and there is nothing to indicate that had it been ambiguous the opening words of the will might not have been used to remove the ambiguity, but the contrary, I think, is to be gathered from the judgments.

See also *King v. George* (1876), 4 Ch. D. 435, at p. 444; *Travers v. Blundell* (1877), 6 Ch. D. 436.

It is also an important consideration that the effect of adopting the restricted construction will be an intestacy as to a large part of the testator's property.

As to the stock in trade, there is still another consideration which is against giving the restricted construction to the gift of it. One of the recognized meanings of the word "stock" is "a fund, capital, the money or goods employed in trade," etc. (*Imperial Dictionary*) (11); "the property which a merchant, a tradesman or a company has invested in any business, including merchandise, money and credits; more particularly the goods which a merchant or a commercial house keeps on hand for the supply of customers" (*Century Dictionary*) (16).

I see no reason why these meanings may not be ascribed to the words "stock and trade" used by the testator; and if they may be, the use of the word "now" is not so inappropriate as it would appear to be if the words be held to mean "stock of goods" only. It may well be that the testator had in mind the capital employed in his business, including the stock of goods, and that he used the words "now in house or out of house" in order to make it clear that the articles employed in the business, though they did not form part of the stock in trade, such as the horses, harness, waggons and sleighs, were meant to be included in the gift to his sister.

It will be observed, also, that the will is not dated, unless it be with the year 1891. In *Cole v. Scott* (1849), 1 MacN. & G. 518, the Lord Chancellor expressed the opinion that where the will is not dated the word "now" must be taken to refer to the

death of the testator. No reasons are given for that opinion; a reason for it was suggested in Jarman on Wills, 3rd ed., p. 311-2, but it is omitted in the subsequent editions.

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I do not rely upon this, because, even if the opinion expressed be correct, it is probably not applicable in this case, for it can hardly be said that the will is undated, in the sense in which the Lord Chancellor used that expression.

The next question is as to what is included in the gift of "the stock and trade." It was argued that \$267 on deposit with the testator's banker, \$60 cash on hand, a quantity of cordwood for use in the shop and dwelling-house, two horses, a set of harness, and some vehicles which were used in the business not very frequently, but as occasion required, were not included in this gift.

I have already stated the meaning which I would give to the words "stock and trade," and it follows from what I have said that the money in bank and in hand, if part of the capital employed in the testator's business, and so much of the cordwood as was intended for use in the business, and the other articles, are embraced in the bequest of "the stock and trade."

The promissory notes, except possibly one of small amount and of no value, also passed to the sister. They were given in settlement but not in satisfaction of book-debts, and for the reasons already given the book-debts, I think, passed to the sister, and the promissory notes also passed as accessories to them.

The shop fixtures form part of the freehold and pass with the house and lot.

I do not understand that it is contended by the brothers that the words "now in house and out of house" are applicable to the household furniture, and at all events I am of opinion that they do not apply to it. The only question, therefore, as to it is whether a number of books belonging to the testator, which were kept in the dwelling-house, pass as part of the household furniture. This question is of little practical importance, because if undisposed of, they are the first to be applied in payment of debts, and the debts far exceed in amount the value of the books.

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HOLDEN.

I am, however, of opinion, that the books are included in the gift to the sister.

Cases are, no doubt, to be found in which it has been held that books are not household furniture, because, as was said in one of the cases, only articles for use or ornament are household furniture, which books are not, being for the entertainment of the mind.

I venture, however, to think that the term is a somewhat elastic one, and that its meaning may vary according as the habits and mode of living change. In a country such as this, and in these later days, there are few houses, even of the humblest character, in which books are not to be found, sometimes it may be for ornament only, but oftener, it is to be hoped, for use, and an owner of them would, I apprehend, be very much surprised if he were told that if he bequeathed his household furniture to some one to whom he desired to leave it, his pictures would but his books would not pass to his legatee; but if it be so, and books will not ordinarily be held to pass by a gift of household furniture, there is enough in the context in this will to justify placing upon the words of the gift a construction wide enough to embrace the books.

The only other question is as to the right of the brother, William Jonas, to a legacy of \$100 to be paid to him by his sister. The testator has omitted to write the word "pay" after the word "shall" and before the words "one hundred dollars," but I think the legacy is nevertheless well given.

In *Parker v. Tootal* (1865), 11 H.L.C. 143, the devise was to "T." for life, with remainder to the first son of the body of "T." lawfully begotten severally and successively in tail male, and it was construed as if the words "and other sons" had been inserted after the words "first son" so as to prevent the subsequent words being in effect struck out of the will.

This decision, and the reasoning on which it was based, afford ample warrant for my conclusion as to the legacy to William Jonas.

It is not unreasonable, I think, that under all the circumstances the costs of the motion should be borne by the estate, and I so direct.

A. H. F. L.

[BRITTON, J.]

KING

v.

THE CORPORATION OF THE CITY OF TORONTO.

1902

Dec. 29.

Municipal Corporations—Plebiscite—Aid to Sanatorium—Injunction.

There is nothing in the Municipal Act permitting a municipal council to take a plebiscite and there is no express prohibition against their doing so.

Taking a vote of the electors upon questions or upon unauthorized by-laws is open to grave objections, and a council which sought to take such a vote on the question of a money grant in aid of a sanatorium, which they had not power to make, with a view to inform the Legislature of the result, and, if favourable, to use the result as an argument in attempting to obtain for the council legislative authority to make the grant, were restrained from doing so.

Helm v. The Corporation of the Town of Port Hope (1875), 22 Gr. 273, followed.

MOTION to continue an injunction restraining the council of the defendant corporation from submitting at an approaching municipal election to the electors qualified to vote on money by-laws the question—

“Are you in favour of the city contributing \$50,000 towards the establishment of a sanatorium for the treatment of residents of Toronto suffering from consumption?”

The motion was argued in Court on the 27th of December, 1902, before BRITTON, J.

Wallace Nesbitt, K.C., and *J. H. Denton*, for the plaintiff.

Fullerton, K.C., and *W. C. Chisholm*, contra.

December 29. BRITTON, J.:—There is nothing in the Municipal Act permitting the council to take a *plebiscite*, and there is no express prohibition against their doing so. The practice has obtained, and in many cases without objection.

In this case if I could see that any advantage to the citizens at large could possibly accrue from such answers, as the electors may choose to give, I would be slow to interfere at this stage.

Britton, J.

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The ballots have been printed, and as there is to be a vote taken upon a money by-law, very little, if any, additional expense will be incurred.

I may say further that in my opinion no actual harm in this particular case would result from allowing the question to be answered.

Davies v. City of Toronto (1887), 15 O.R. 33, is a case in which an injunction was refused. In that case, however, the council had full power to deal with the matter without the consent of the electors. The learned Judge distinguishes in that respect the case from *Helm v. The Corporation of the Town of Port Hope* (1875), 22 Gr. 273, which is an authority for the plaintiff's contention.

In the latter case the defendants were restrained "from obtaining the vote of the ratepayers in favour of a by-law which, if passed, would be illegal without legislative sanction, and which sanction such vote was intended to aid." In giving judgment Chancellor Spragge says a good deal, pertinent to the present case, and particularly as to the propriety of using the machinery provided for elections and for taking the vote upon by-laws, for getting the opinion of electors upon questions, with a view to some subsequent action.

In that case the persons were permitted to vote, who had no right to vote upon a bonus by-law. Here, so far as the defendants can control it, only those who are entitled to vote on the money by-law for the issue of \$175,000 debentures for the purpose of a water works engine, are at liberty to vote on this question.

Taking a vote upon questions or upon unauthorized by-laws is said to be open to grave objections. Here the avowed purpose is to inform the Legislature of the result, and if the answers are favourable to use this result as an argument in attempting to obtain, for the city, power which it has not at present of making the contribution of \$50,000 without submitting a by-law to the people.

The decision in the *Helm* case is expressly against a *plebiscite* in a matter in which the council cannot itself act.

In the case of *Davies v. The City of Toronto*, the learned Judge, while distinguishing it from the case of *Helm v. Port*

Hope, said, "Were it now proposed to give the result of the proposed vote a final and binding effect there could be no doubt as to the duty of the Court to restrain it," p. 39. These remarks have an application here.

The object of this proposed vote is not to take the matter out of the hands of the council, but to so influence the Legislature, that the city council may, if possible, obtain power to act without submitting details to the electors for a vote upon the by-law.

In the *Davies* case, it was simply allowing the citizens if they thought proper to advise the council upon a matter clear and distinct, provided for by by-law, and as to which public attention was specially called by advertisement, and in reference to which, the council could act without any such advice.

The council proposed to reduce the number of licenses for the next year, as follows: Tavern licenses to 100, shop licenses to 20, and the question was, "Are you in favour of the reduction?" The ballot papers were printed,

"For the reduction."

"Against the reduction."

The issue was clearly defined. It was a definite reduction for a particular year.

This case is entirely different, not only as to the power of the council, but as to the question submitted.

The gentlemen who in presenting their views to the council, in favour of this large contribution of \$50,000, did so only upon the express condition that any such contribution be "surrounded by conditions and restrictions such as should protect the municipality against any future or unexpected expense."

The reports of the medical health officer, the city solicitor and Dr. Lynd to the council ask that *many points*, set out in clauses A, B, C and D, should be made clear.

These conditions and suggestions the majority of the electors know nothing about. Many electors may be in favour of such a contribution upon the conditions named in the report. Many may be in favour of such a contribution upon other conditions. The answers, to be of any value, would depend upon further questions.

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Where is the sanitorium to be located? At what cost? What would be its size and equipment? Would it be free to all, or a part free? How managed? If the cost would exceed \$50,000, how is the balance to be provided? How is the cost of maintenance to be secured?

Other questions could easily be suggested, answers to which are necessary to enable the electors to intelligently answer the question. Most important of all is this, is the sanitorium to be established by an individual or by a company? And is this sum of \$50,000 to be given in aid of such an institution when established? Or is the sanitorium to be established by the city alone, or by the city and some other one or more municipality or municipalities?

In either case, whether to aid or establish, it will be time enough to answer the question when a carefully prepared by-law is submitted giving all necessary information and safeguarding the grant.

In *Darby v. The Corporation of the City of Toronto* (1889), 17 O.R. 554, at p. 561, Mr. Justice Osler speaking of taking a vote even upon questions wholly in the power of the council to deal with, says, "It is another instance of a pernicious practice which has been too frequently resorted to, of taking a *plebiscite* upon a subject wholly within the discretion of the council, which it is their duty to decide and to take the responsibility of deciding themselves, without putting the public to the expense. In this case, it is true, no additional expense will be incurred as there is also a by-law to be voted on, but the practice is none the less objectionable as an attempt to evade responsibility, and to place it where it does not belong."

The case of *Davies v. The City of Toronto* was apparently not cited on the argument of the case of *Darby v. Toronto*.

Helm v. The Corporation of the Town of Port Hope is in principle on all fours with the present case. I continue the injunction.

If the plaintiff does not ask anything more than injunction this may be considered as a motion for judgment, and there will be judgment for the plaintiff, for an injunction with costs.

[BOYD, C.]

ATTORNEY-GENERAL FOR ONTARIO V. BROWN ET AL.

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Jan. 10.

Revenue—Succession Duty—“Dutiable” Property—Transfer of Property before Death—Donatio Mortis Causá—Contract for Valuable Consideration—Estoppel—Survivorship.

The aggregate value of the estate of an intestate was \$12,877, and of this \$7,540 passed to the hands of his niece by virtue of an agreement between them, given effect to by a *donatio mortis causá*, as established in *Brown v. Toronto General Trusts Corporation* (1900), 32 O.R. 319:—

Held, that the \$7,540 was not dutiable under the Succession Duty Act, R.S.O. 1897, ch. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but made in pursuance of a contractual obligation for value; and the niece not being estopped, by the form of the judgment in her action against the Toronto General Trusts Corporation, from setting up in this action, brought on behalf of the Crown to recover succession duty, that the transfer was not a gift, but the implementing of a contract.

Held, also, that the \$7,540 did not pass by survivorship within the meaning of sec. 4 (d) of R.S.O. 1897, ch. 24.

THIS was an action brought by the Attorney-General for Ontario, as representing His Majesty, against Amanda Brown and others, the heirs-at-law and next of kin of Benjamin Brown, deceased, and the Toronto General Trusts Corporation, the administrators of the real and personal estate of the deceased, for a declaration that such estate, including certain property given to the defendant Amanda Brown by way of *donatio mortis causá*, was liable to succession duty, and to have an account taken of the amount due in respect of such succession duty, and for judgment for the payment of the amount ascertained to be due upon such accounting.

The statement of claim alleged: (1) that Benjamin Brown died on the 31st December, 1899, intestate, leaving real and personal property aggregating \$12,877; (2) that the defendants were the administrators of the estate and the heirs-at-law and next of kin, being nephews and nieces and the children of deceased nephews and nieces; (3) that shortly before the death of Benjamin Brown, and within twelve months thereof, he, when on his death-bed, and in anticipation of his death, delivered into the hands of the defendant Amanda Brown his bank book, shewing the moneys to his credit deposited in a savings bank, and delivered to her certain promissory notes

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and a mortgage, under such circumstances as constituted a valid *donatio mortis causá*, and the defendant Amanda Brown in an action brought by her against the defendants the Toronto General Trusts Corporation had been declared entitled to such moneys, notes, and mortgage, by virtue of such *donatio mortis causá*, the value of the property comprised being in all \$7,540; (4) that nothing had been paid by the defendants in respect of succession duty.

The statement of defence of the defendant Amanda Brown admitted the truth of the statements made in the 1st, 2nd, and 4th paragraphs of the statement of claim, but denied the other allegations, and set up that the estate of Benjamin Brown was not sufficient in amount to render it liable to the payment of succession duty; that the property and money recovered by her in her action against the Toronto General Trusts Corporation was not any part or portion of the estate of Benjamin Brown, deceased, but was her own absolute property under an agreement between her and the deceased, and that the *donatio mortis causá* was only a carrying out of the agreement, and the judgment in that action so determined.

The other defendants submitted their rights to the Court, alleging that they had always been and still were ready and willing to pay such succession duty as the estate was subject to under the Succession Duty Act.

By an agreement made between the parties, the action was brought to trial upon the above pleadings and the evidence taken in the action of *Brown v. Toronto General Trusts Corporation*, the judgment therein, and certain affidavits and documents not necessary to refer to.

Brown v. Toronto General Trusts Corporation (1900) is reported in 32 O.R. 319, where the facts are stated.

The case was heard by BOYD, C., on the 8th January, 1903.

A. B. Aylesworth, K.C., for the plaintiff. The gift is clearly dutiable. Under the decree in *Brown v. Toronto General Trusts Corporation* the defendant Amanda Brown is estopped from saying the property given to her was not given by way of *donatio mortis causá*. The pleadings shew that the property passed by survivorship or by succession under sec. 4

(d) of R.S.O. 1897, ch. 24. Even if it were a partnership transaction, duty would be payable. I refer to *Attorney-General v. Brown* (1897), 77 L.T. 591; *Attorney-General v. Robertson*, [1893] 1 Q.B. 293; *Attorney-General v. Heywood* (1887), 19 Q.B.D. 326, 332; *Attorney-General v. Gosling*, [1892] 1 Q.B. 545; *Attorney-General v. Montefiore* (1888), 21 Q.B.D. 461.

F. Arnoldi, K.C., for the defendant Amanda Brown. Under the English Act any property acquired by death is a succession and liable to duty: see *Attorney-General v. Robertson*, [1893] 1 Q.B. at p. 294. Section 2 of our Act covers all property which can be liable to succession duty. This property is not within the term as used in the Act. The uncle was not absolutely entitled to the property. Before his death he specifically performed the contract made years before. He could have made a gift of this property to no one else. Part of this defendant's claim was for wages at \$300 a year. She would be entitled to at least \$10,000 as wages. Any title can be set up as against the Crown. Part of the principal was contributed by the defendant when the agreement was made, thirty-six years ago. I refer to *Freeth on Death Duties*, p. 98.

A. L. Colville, for the other defendants, submitted their rights to the Court, and claimed protection as to costs, and compensation to the administrators.

January 10. BOYD, C.:—Succession duties may be recovered by action, and therein the Court has jurisdiction to determine what property is liable to duty under the Act 62 Vict. (2) ch. 9, secs. 1, 2 (O.)

In this case it is admitted in the pleadings that the aggregate value of Brown's estate was \$12,877, and of this it is admitted \$7,540 passed to the hands of the defendant Amanda Brown. The manner of its reception by Miss Brown is, however, in dispute. The contest is whether this sum is "dutiable," for if it is not and it falls to be deducted from the "aggregate," then the estate is not subject to the Act. By a process of amendments it is now the law that the Act shall not apply to any estate the value of which, after the allowances authorized by the Act are deducted, does not exceed \$10,000: R.S.O.

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1897, ch. 24, sec. 3, sub-sec. 1, as amended by 1 Edw. VII. ch. 8, sec. 4.

“Dutiable value” is defined by the Act as the value of the property after the debts or other allowances or exemptions authorized by the Act are deducted: 1 Edw. VII. ch. 8, sec. 3 (3). And by the same section, and as sub-sec. (4), it is said: “In determining the dutiable value of the estate of a deceased person for the purposes of the payment of succession duty . . . the value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral expenses and for *his* debts and incumbrances; and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property; but an allowance shall not be made for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money’s worth wholly for the deceased’s own use and benefit, and take effect out of his interest.” These provisions are all found in 1 Edw. VII. ch. 8, sec. 3 (4).

These clauses may apply to this transaction between the deceased and his niece Miss Brown, if it be taken that the \$7,500 was not transferred before death to the defendant. If it be the better view that there was such a transfer, the other clauses of the Act have to be considered, which however lead to the same legal issue. By R.S.O. 1897, ch. 24, sec. 4 (b), “All property . . . which shall be voluntarily transferred by . . . gift made in contemplation of the death of the . . . donor, or made or intended to take effect, in possession or enjoyment after such death” and (c) property taken as a *donatio mortis causâ* or other disposition by way of gift, etc., etc., shall be subject to succession duty. The essential point to be observed in these sub-sections (b) and (c) is that the transaction is a *voluntary* one, *i.e.*, for which there is no consideration. It may be that the extent of consideration is intended to be defined by sec. 4 (10), which enacts that nothing herein contained shall render liable for duty any property *bonâ fide* transferred for a consideration that is of a value substantially equivalent to the property transferred. But, assuming that this supplies the test to ascertain whether a transaction is or is

not "voluntary," the transfer in question will answer the test abundantly.

The nature of the transaction was investigated in *Brown v. Toronto General Trusts Corporation*, 32 O.R. 319. Upon the trial of *Brown v. Toronto General Trusts Corporation*, and upon the same evidence as is now relied on, I found as a fact that there was well proved an agreement between the deceased and his niece Amanda Brown whereby they were to combine their chattel property and their personal energies in the working of the farm owned by the deceased, and its belongings, upon a mutual obligation that the survivor should become possessed of the whole personalty resulting from this co-operation of goods and labour.

In pursuance of this agreement, which had existed and been acted on in good faith for over 30 years, the deceased handed over to her, just before his death, the *indicia* of title to moneys and other property such as might be the subjects of a *donatio mortis causá*. And I found that what was done was sufficient to establish her right to that property in the aspect of a mere gift; but, beyond that, I gave effect to the agreement by declaring her entitled to other chattel property falling under the above agreement, to the amount of several hundred dollars. The moneys bestowed amounted to over \$6,000. As against the claim of the Crown for succession duty, it is competent for Amanda Brown to avail herself of every ground of exemption afforded by the law. She is not, in other words, as to the present claim estopped by the form of the judgment in the case of *Brown v. Toronto General Trusts Corporation*, but may rely on other aspects of the real liability which existed between her and the deceased.

Now, while the handing over of the \$6,000 moneys, etc., may be rested on the mere *donatio mortis causá*, it is in truth much more than this; the bestowment was not a matter of bounty; it was, as I have declared in giving reasons for the judgment in *Brown v. Toronto General Trusts Corporation*, a matter of obligation, binding upon the deceased and his estate. If it happened, as it did, that the uncle should predecease her, then this personal estate did not pass beneficially to his next of kin or legal representatives; it became in that event potentially the property of his niece, and her right to it has been vindicated

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by the Court as against the administratrix. She did not succeed to his personal estate by any testate or intestate right —by no voluntary disposition on the part of the deceased and by no legal transmission as upon an intestacy—but by virtue of a valid and long standing contractual obligation which made her more than a general creditor in respect to this personalty.

Taking this basis of fact as well established, it appears evident that the bestowment of this property before the death was not such a voluntary disposition or transfer by the intestate as is specified in the Act. Full value of money's worth was given for all that was received. The whole country-side knew of the agreement, and the neighbours proved that her work and services were worth more than all she got under the arrangement.

Therefore, on the facts I find that the property was transferred for a consideration substantially equivalent in money's worth to its value. And, on the other aspect of the case, I find that there was, at the death of the intestate, a debt due by him to his niece, in respect of work and services in the house and on the farm and as a nurse, exceeding \$6,000 *bonâ fide* incurred.

This sum, say \$6,000, should be deducted from the aggregate value of the estate, and so it results that Brown's estate is not within the Act.

I have not overlooked the argument that this case falls within sec. 4 (*d*) of R.S.O. 1897, ch. 24, but that provision is addressed to another sort of property which passes by survivorship, *i.e.*, joint tenancies created by the deceased when absolutely entitled to the whole. That does not fit this case. It is also to be distinguished from this, wherein the property in question does not pass or accrue by survivorship, *i.e.*, by operation of law, having regard to the nature of the estate or interest in the property, but is the subject of an express agreement which takes effect at the death as part of the contract. The right does not arise because of the death, but by virtue of the prior agreement between the parties, upon which their whole course of action was based for 36 years.

The action should be dismissed with costs.

E. B. B.

[IN THE COURT OF APPEAL.]

DAVIS V. WALKER.

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Jan. 4.

Dec. 5.

Gift—Donatio mortis causá—Solicitor and Client—Absence of Independent Advice—Invalidity of Gift.

Held, per Moss, C.J.O., and GARROW, J.A., where at the time of the making of an alleged *donatio mortis causá*, the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to any one, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the deceased, such gift could not be supported. *MACLENNAN, J.A.,* dissenting.

Per OSLER, J.A.:—Apart from the question of confidential relationship, the plaintiff's testimony as a litigant making a claim upon the estate of a deceased person in respect of a matter occurring before the death of such person had not been corroborated by some other material evidence as required by section 10 of the Evidence Act, R.S.O. 1897, ch. 73.

Judgment of Falconbridge, C.J.K.B., affirmed.

THIS was an appeal from the judgment of Falconbridge, C.J.K.B., delivered in an action tried before him, without a jury, at Sandwich on December 2, 1901.

The action was brought by the plaintiff, a solicitor of the Supreme Court of Judicature for this province, who claimed to recover from the defendant George Walker, the administrator of the estate and effects of Betsy Ann Walker, deceased, certain money, securities therefor and evidences of title thereof, belonging to the said Betsy Ann Walker in her lifetime, namely, money, deposited in a bank, money secured by a mortgage, and the purchase money of certain land agreed to be sold, making in all a sum of \$1,500, the said deceased having handed to the plaintiff the bank books, mortgage and title deeds of the property, and the agreement for the sale thereof, the plaintiff claiming that he was entitled to the said money as a *donatio mortis causá*; and he asked to have it so declared, and to have the sum paid over to him.

The facts fully appear in the judgment of the learned Chief Justice and in the judgments of the Judges in the Court of Appeal.

W. R. Riddell, K.C., for the plaintiff.

E. S. Wigle, for the defendant.

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The learned Chief Justice reserved his decision, and subsequently delivered the following judgment :—

January 4. FALCONBRIDGE, C. J.:—The rule that delivery of a chattel is essential in order to constitute a valid *donatio mortis causâ* is satisfied by an antecedent delivery of the chattel *alio intuitu* to the donee: *Cain v. Moon*, [1896] 2 Q.B. 283; *Richer v. Voyer* (1874), L.R. 5 P.C. 461.

So far as the law is concerned, the things said to have been given here were all valid subjects of *donatio mortis causâ*: *Brown v. Toronto General Trusts Corporation* (1900), 32 O.R. 319.

The three requirements of an ordinary effectual *donatio mortis causâ* (*per* Lord Russell, C.J., in *Cain v. Moon*, at p. 286) are here combined.

And I think, too, there is sufficient corroboration in law and in fact of the statement of the plaintiff, whose evidence I accept, and who has in my opinion acted in entire good faith.

But the plaintiff is a solicitor, and he had done any legal business which the donor in her lifetime had to do, and was therefore her solicitor, and the donor acted without having any independent legal advice.

Mr. Riddell strongly contended that this element ought not to find room in the consideration of a case of *donatio mortis causâ*, and I understood him to question whether there was any authority for it.

But the principle which I consider applicable to a case of *donatio mortis causâ* appears to have been very clearly laid down by Sir Edward Sugden, when Lord Chancellor of Ireland (*Walsh v. Studdard* (1843), 4 D. & W. 159, at p. 171): "Would this Court permit a solicitor, with money of his client in his hands, to come out of a room in which his client was—least of all out of a sick room, where his client was lying at the point of death,—and where he was alone with him, and say that the client allowed him to retain for his own purpose a portion of a sum of money then in his hands. If so, then there would be no safety in the ordinary dealings and transactions of life; and there is no class of the community upon whom it would press more heavily, than the

solicitors themselves; for instead of families reposing confidence in them, as they now do, they would be obliged to deny them private access to their clients. But the law does not allow such transactions to stand."

The Lord Chancellor is not dealing here at all with the question of corroboration, because he had already asked the question, "What proof is there that this conversation ever took place?" And then he lays down the principle as above on the assumption that it did take place.

And in the same volume (*Thompson v. Heffernan*, 4 Dr. & W. 285), the same eminent Judge lays down stringent rules respecting alleged gifts from a dying man to a clergyman in attendance.

See also *Goddard v. Carlisle* (1821), 9 Price 169; *Liles v. Terry*, [1895] 2 Q.B. 679.

The plaintiff's action will be dismissed.

From this judgment the plaintiff appealed to the Court of Appeal.

On April 22nd, 1902, before OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., the appeal was argued.

W. R. Riddell, K.C., for the appellant. The learned Chief Justice was of the opinion that the gift could not be supported, because at the time it was made the relationship of solicitor and client existed between the parties, and that the donor had not had the benefit of independent legal advice, but that in other respects all conditions existed to make it a good *donatio mortis causâ*. The relationship of solicitor and client, however, did not exist at the time the gift was made. The plaintiff had merely on some occasions given the donor professional advice, and was never looked upon by her as her legal adviser, but rather as a friend, or as one of her own family. Even assuming that the relationship of solicitor and client did exist, it was not essential that there should have been independent legal advice, so long as the Court are satisfied that the donor knew what she was doing, and that no undue influence had been exercised by the plaintiff to induce her to make the gift to him. There is a distinction between a

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donatio mortis causá and a gift *inter vivos*, and greater strictness is required with regard to the latter. A *donatio mortis causá* is of a testamentary character and is revocable, while in a gift *inter vivos* the property is intended to pass at once and the gift is irrevocable. No doubt the onus was on the solicitor to shew good faith, but he has done so here, and the learned Judge has expressly so found. The donee can establish the gift by his own evidence; but even, if corroboratory evidence is required, there is such evidence here: *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462; *Hindson v. Weatherill* (1854), 5 DeG. M. & G. 301; *Thomas v. Heffernan* (1843), 2 Dr. & W. 285; *James v. Greaves* (1725), 2 P. Wms. 270; Taylor on Evidence, 9th ed., sec. 965; *Liles v. Terry*, [1895] 2 Q.B. 679; *Hunter v. Atkyns* (1832), 3 My. & K. 113; *Barton v. Cox* (1858), 3 H. & N. 387; *Rummens v. Hare* (1876), 1 Ex. D. 169; *Edwards v. Meyrick* (1842), 2 Ha. 60; *Montesquieu v. Sandys* (1811), 18 Ves. 302; Cordery on Solicitors, 3rd ed., p. 201; *Jones v. Selby* (1710), 2 Finch's Prec. Ch. 300; Snell's Equity, 13th ed., p. 373; *Cooke v. Lamotte* (1851), 15 Beav. 234, 240; *Harris v. Tremenheere* (1808), 15 Ves. 34; *Hoghton v. Hoghton* (1852), 15 Beav. 278, 300; *Hall v. Hall* (1891), 20 O.R. 684, (1892), 19 A.R. 292; *Rhodes v. Bate* (1865), L.R. 1 Ch. 252; *Morgan v. Minnett* (1877), 6 Ch. D. 638. The case of *Walsh v. Studdard*, 4 Dr. & W. 159, 2 C. & L. 423, referred to by the Chief Justice, was a gift *inter vivos*. No case can be found holding that a *donatio mortis causá* is governed by the same strict rules as in a case of a gift *inter vivos*. Then as to costs where good faith is established, the costs are payable out of the estate.

E. S. Wigle, for the respondent. The learned Chief Justice properly came to the conclusion that the relationship of solicitor and client existed between the parties. There is no question but that the plaintiff did whatever solicitor's work the donor required to have done, and once it is shewn that a party has acted in the capacity of solicitor, the presumption is that he continues so to act and the onus is on the solicitor to shew that the relationship has terminated; but as a matter of fact the relationship did exist and he was the donor's solicitor at the time the gift was made, and about a month before that she

actually consulted with him with regard to some property, a part of which subsequently constituted the gift in question. There is no such distinction as is contended for on behalf of the plaintiff between a *donatio mortis causâ* and a gift *inter vivos*. In either case the gifts to solicitors are viewed by the Court with the utmost strictness, and unless the client has independent advice the Courts have refused to allow them to stand. The rule is read most strictly with regard to a solicitor who is assumed to know the law: Thornton on Gifts, p. 224; *Payne v. Marshall* (1889), 18 O.R. 488; *Brown v. Davis* (1889), 18 O.R. 559; *Goddard v. Carlisle* (1821), 9 Price 169; *Rhodes v. Bate*, L.R. 1 Ch. 252; *Barron v. Willis*, [1900] 2 Ch. 121; *Liles v. Terry*, [1895] 2 Q.B. 686; *Trust and Guarantee Co. v. Hart* (1901), 2 O.L.R. 251; *Adams v. McBeath* (1896), 27 S.C.R. 13; Story's Equity Juris., 2nd Eng. ed., sec. 310-11; White & Tudor's L.C., 7th ed., p. 404. If transactions of this kind were to be upheld it would open the door to fraud and undue influence being exercised. The plaintiff should be directed to pay the costs.

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December 5. Moss, C.J.O.:—This was an appeal by plaintiff from the judgment of Falconbridge, C.J., dismissing the action.

The defendant is administrator of the estate of Betsy Ann Walker, who died on the 28th of February, 1900, intestate and without children.

The plaintiff's action is to recover from the estate of the deceased a sum of \$1,500, representing the amount of certain bank deposits and of sums due to the deceased upon a mortgage and under an agreement for sale of a parcel of land. The plaintiff claims that on the day before her death the deceased gave him the bank books, mortgage and agreement for sale, and that they were received by him as a *donatio mortis causâ*.

The learned Chief Justice found that at the time in question the plaintiff was the solicitor of the deceased; and held that, having relation to that fact and the circumstances under which the alleged gift was made, it was not valid. At the time when the gift was made the deceased and the plaintiff were alone: there had been no previous intimation to the plaintiff or any

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one else of an intention to make the gift; no other or disinterested person was called in, and no advice or explanation as to the nature and effect of the proposed gift was given by the plaintiff or any one else.

In my opinion the judgment appealed from is right, and should be affirmed. The evidence makes it clear that for many years before the transaction in question and down to the day on which it took place, the plaintiff was the trusted solicitor and business adviser of the deceased, and that the relation had never been severed. The transaction took place, therefore, during the subsistence in its fullest influence of the relation of solicitor and client. The handing over to the plaintiff of the sum of \$1,500, or the placing him in possession of documents or indicia of title which would enable him to receive that sum, was an act of bounty on the part of the deceased, and none the less so because it was made with the intention, to borrow the expression of Lord Russell of Killowen, C.J., in *Cain v. Moon*, [1896] 2 Q.B. 283, at p. 286, that it should "revert to the donor in case of her recovery."

The rule of law with regard to gifts by clients to their solicitors is much stricter than the rule with regard to other dealings between them, and it has been so from an early period. In *Tomson v. Judge* (1855), 3 Dr. 306, Vice-Chancellor Kindersley pointed out the difference between a gift and a purchase. He said (p. 314): "There is this obvious distinction between a gift and a purchase. In the case of a purchase the parties are at arm's length, and each party requires from the other the full value of that which he gives in return. In the case of a gift, the matter is totally different, and it appears to me that there is a far stricter rule established in this Court with regard to gifts than with regard to purchases, and that the rule of this Court makes such transactions, that is of a gift from the client to the solicitor, absolutely invalid." And, after referring to the earlier decisions, he said (p. 315): "I think that those cases are sufficient to shew that in the opinion of Lord Thurlow, Lord Erskine and Lord Eldon, the view of this Court is that the rule with regard to gifts is absolute, that is, it is not open to the attorney to shew that the transaction was fair; but that the gift cannot stand."

In *O'Brien v. Lewis* (1862), 4 Giff. 221, Sir John Stuart, V.-C., expressed the rule in substantially similar terms, and his decision was affirmed by Lord Westbury (1863), reported in 32 L.J.N.S. Ch. 572.

While the relation exists, so long as it remains unsevered either by the solicitor having ceased to hold the position of or to act as solicitor for the donor, or possibly by the intervention of other and wholly independent advisers as to the nature and effect of the particular transaction, a solicitor cannot validly accept a bounty from his client.

In *Morgan v. Minet* (1871), 6 Ch. D. 638, Vice-Chancellor Bacon states the matter thus, at p. 646: "It is not said that that relation prevents a client bestowing his bounty upon his solicitor, but what the law requires is that considering the enormous influence which a solicitor in many cases must have over his client, in order to give validity and effect to a donation from a client to his solicitor that relation must be severed." Further on, at p. 647, he points out that it is not the inability of the client to confer bounty upon his solicitor, but the inability of the solicitor to accept it while the relation exists that the law recognizes and enforces.

I see no reason why the rule should not apply to a *donatio mortis causá*, as much as to a gift *inter vivos*. It is not necessary to determine whether *Walsh v. Studdart* (1843), reported in 4 Dr. & W. 159, and 2 C. & L. 423, was a case of *donatio mortis causá* or of gift *inter vivos*. The remarks of Sir E. Sugden as to the duty of a solicitor receiving a present from his client have a bearing on the point. See especially p. 428 of the last mentioned report. The rule has been held to apply so as to exclude the ordinary presumption of a gift to a son being an advancement in a case where the son was also the solicitor of his parent: *Garrett v. Wilkinson* (1848), 2 DeG. & S. 244. If there is to be any difference, and the case of a *donatio mortis causá* is to be likened to the case of a provision in favour of a solicitor contained in a will drawn by himself or under his instructions, then it lies upon the solicitor claiming the benefit to remove all suspicion, and to prove affirmatively that the donor was fully aware of the nature and effect of the gift, and with such knowledge approved of what was being

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done. In this case, if all that the plaintiff states occurred between him and the deceased had been written down by him and signed by her, the production of that paper would not have been sufficient to establish the plaintiff's case.

There is an entire absence of evidence to shew that the nature of the transaction was explained, or that the usual precautions for making sure that she fully understood what she was doing, and its effect with regard to the property she was dealing with, were adopted: *Tyrrell v. Painton*, [1894] P. 151.

I think the plaintiff has failed to establish a case for the relief he seeks.

The defendant claims by way of cross-appeal to vary the judgment of the learned Chief Justice by directing the plaintiff to pay the defendant's cost of the action, but I think no case has been shewn for interfering with the discretion exercised.

The appeal and cross-appeal should be dismissed.

OSLER, J.A.:—I think the appeal must be dismissed. I rest my judgment on the ground that the plaintiff's testimony has not been corroborated as required by sec. 10 of the Evidence Act, R.S.O. 1897, ch. 73.

The learned trial Judge seems to have thought that it was, although the evidence which led him to that conclusion is not referred to; but, in reliance upon the case of *Walsh v. Studdart*, 4 Dr. & W. 159, he held that the action failed because the plaintiff, being the donor's solicitor and standing towards her in that confidential relation, could not maintain the benefaction as a *donatio mortis causâ* without proof that the donor had independent legal advice. *Walsh v. Studdart* is not a case of *donatio mortis causâ*, but in the view I take of the case at bar it is not necessary to determine whether it applies to it.

After a careful perusal of the evidence, I fail to find anything which can be regarded as corroborative of the plaintiff's testimony within the meaning of sec. 10 of the Evidence Act as construed in several decisions of our Courts. Quite independently, therefore, of any difficulty which might be thought to arise out of the confidential relation which undoubtedly existed between the plaintiff and the deceased donor, the

statute has imposed upon him, as a litigant making a claim upon the estate of a deceased person in respect of a matter occurring before the death of such person, the obligation or onus of having his own evidence, where his claim depends upon it, corroborated by some other material evidence.

I am not to be taken as imputing untruthfulness to the plaintiff. I am merely insisting upon the application of the statutory rule, the wholesomeness of which in a case like the present is self-evident. I think its requirement has not been complied with, and would therefore affirm the judgment.

MACLENNAN, J.A.:—If the gift in question were claimed as absolute, and not one *causâ mortis*, and therefore revocable, the case on which the learned Chief Justice rested his judgment would be conclusive.

The case is *Walsh v. Studdart*, 4 Dr. & W. 171, reported also in 2 C. & L. 423, and was not a case of *donatio mortis causâ* at all, although indexed as such in the report, and treated as such in 1 W. & T.L.C., 7th ed., 406, 413. There the donee had been the solicitor and land agent of the donor, with a large balance in his hands due to the latter. In March, 1831, while the donor was in good health, it was alleged that he verbally authorized the donee to retain £300 of what was in his hands, and to buy a carriage or some other present for his wife, and that on the 2nd July, after the donor had become suddenly ill and just before his death, the gift had been confirmed, also verbally. There was no evidence of all this but that of the donee himself. It is plain that in that case the gift could only be supported as a gift *inter vivos*. The inference which might be drawn from the fact that the gift was confirmed while the donor was *in extremis*, that it was to take effect only in case of his death, was displaced by express evidence to the contrary, that it was to enable him to buy a present for his wife. Besides, there was no tradition or delivery of anything there, which is essential, to a *donatio mortis causâ*: *Bunn v. Markham* (1816), 7 Taunt. 224, at p. 231.

The learned Chief Justice has found everything in favour of the plaintiff in this case, but holds that, he having been the donor's solicitor, the gift was invalid because she acted without

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having had any independent legal advice. He in effect found that if the plaintiff had not been the donor's solicitor, the gift would have been good. These findings were contested before us by the appellant, but I think they were amply justified by the evidence. The question then is whether, having been her solicitor, the gift ought not to be allowed to stand.

The first observation to be made is that a *donatio mortis causá* being revocable *ab initio*, and being conditional upon the death of the donor, resembles a legacy in most respects, and the equities applicable to them cannot be different. I therefore think that the law applicable to wills is that which is to be applied to such gifts, and not that which is applicable to gifts *inter vivos*.

I had occasion to consider and apply that law recently in *Collins v. Kilroy* (1901), 1 O.L.R. 503, and it is not necessary to repeat what was there said. It was there pointed out that a person standing in a fiduciary relation may lawfully exert his influence to obtain a legacy, and unless there has been something amounting to coercion or fraud, such a legacy is good: *Huguenin v. Baseley* (1807), 1 W. & T.L.C. 247, at p. 287, and cases there cited; Kerr on Fraud, 3rd ed., 274-9. Nothing of the kind has been proved here.

There is, however, the other rule stated by Lord Hatherley in *Fulton v. Andrew* (1875), L.R. 7 H.L. 448, at p. 471, that a person who is instrumental in the framing of a will, and who obtains a bounty by that will, has thrown upon him the onus of shewing the righteousness of the transaction.

If the plaintiff is to be regarded as having been instrumental in procuring this donation, then I think he has discharged that onus. It is proved that the donor had for a good many years a strong friendship for the plaintiff. They often visited at each other's houses. The donor had a room in her house specially called the plaintiff's room, which he occupied whenever he visited her. She had made a will giving all her property to the plaintiff's wife, which became inoperative both by the donor's subsequent marriage, and the death of the plaintiff's wife. On several occasions, before the gift, she had said to persons with whom she was intimate, that she intended to give the plaintiff her property at her death. She was fully aware

of the uncertain state of her health, and that she might die at any time; and she seems to have gone from her home at Colchester to the plaintiff's house at Amherstburg, where the gift was made, and where she afterwards died, with the very purpose and object of making the gift.

If therefore it is proved, as I think it is, that the donor and the plaintiff and his family had for a long time been intimate friends, that she had for some time an intention of giving him her property at her death, that without any request or solicitation on his part she came to his house, and while there made these gifts to him in the manner which he has described, I think the plaintiff has shewn that the transaction was righteous, and that it is valid.

I therefore think the appeal should be allowed with costs, and that there should be judgment for the plaintiff with costs.

GARROW, J.A., concurred with MOSS, C.J.O.

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Jan. 26.

Copyright—Foreign Reprints—Notice to English Commissioners of Customs—Entry at Stationers' Hall—Copyright in Encyclopædia—Prima facie Evidence of Copyright—Imperial Acts in force in Canada—Imp. 5-6 Vict. ch. 45, secs. 17, 18, 19—Imp. 39-40 Vict. ch. 36, sec. 152.

Held, that section 152 of the Imperial Customs Law Consolidation Act, 1876, 39-40 Vict. ch. 36, requiring notice to be given to the Commissioners of Customs of copyright and of the date of its expiration, is not in force in this country, notwithstanding the expression of opinion in Part IV. of the Appendix to Volume 3 of the Revised Statutes of Ontario, 1897, to the contrary effect; and that the plaintiffs had established their right to an injunction perpetually restraining the defendants, the Imperial Book Company, Limited, from importing into Canada any copies of the 9th edition of the Encyclopædia Britannica, and for delivery up thereof for cancellation, and for an account.

Semble, if in such notice to the Commissioners a wrong date is given as that of the expiry of the copyright, this will invalidate the notice.

Held, also, that a certified copy of the entry at Stationers' Hall is *prima facie* evidence of proprietorship of copyright of an Encyclopædia under sections 18 and 19 of the Imperial Copyright Act, 1842, and it is not necessary for such *prima facie* case to prove the facts which by those two sections are made conditions precedent to the vesting of the copyright in one who is not the author.

The plaintiffs by agreement in writing in consideration of a large sum of money gave certain other persons the exclusive right to print and sell the edition of the work in question at not less than certain fixed prices, for the remainder of the duration of their copyright except the last four years thereof and delivered over to them the plates used in printing which with all unsold copies were to be re-delivered on the expiry of the agreement and agreed not to announce the publication of another edition before such last mentioned period, but expressly reserved the copyright to themselves:—

Held, that the agreement was a license and not an assignment, and so did not require registration under section 19 of 5-6 Vict. ch. 45 (Imp.).

THIS was an action by the proprietors of the copyright in the 9th edition of the Encyclopædia Britannica, and the licensees of exclusive rights of sale, to restrain alleged infringements of the copyright by the importation and sale of an edition printed in the United States; and was tried before STREET, J., at the Toronto non-jury sittings on September 23rd, 1902.

The facts are stated in the judgment.

W. Barwick, K.C., and *J. H. Moss*, for the plaintiffs, contended that when the duty imposed by 31 Vict. ch. 56 (D.), in favour of British copyright holders was repealed by the Dominion Parliament in 1886, R.S.C. Sched. A., vol. 2, p. 2278, the prohibitions contained in Imp. 5 & 6 Vict. ch. 45, again became

operative in Canada: *Morang & Co. v. Publishers' Syndicate* (1900), 32 O. R. 393; *Smiles v. Belford* (1877), 1 A. R. 436; Imp. 5-6 Vict. ch. 45, sec. 17; and that the certificate of registration at Stationers' Hall was evidence of the plaintiffs' ownership of the copyright: Imp. 5-6 Vict. ch. 45, secs. 11, 19.

S. H. Blake, K.C., and *W. E. Raney*, for the defendants, the Imperial Book Co., questioned the decision in *Morang v. Publishers' Syndicate*, 32 O.R. 393, but admitted it was binding in this Court; and contended that the Clark Co. were the real proprietors of the copyright, but had no *locus standi* to maintain this action, not having registered at Stationers' Hall; that the registration in Stationers' Hall did not conform to sec. 19 of Imp. 5 & 6 Vict. ch. 45: Copinger on Copyright, 3rd ed., p. 146; that there was no proper notice to the Commissioners of Customs under Imp. 39 & 40 Vict. ch. 36, sec. 152 (which is to be read with Imp. 5 & 6 Vict. ch. 45, sec. 17), the wrong date of expiry of copyright having been given: *Mathieson v. Harrod* (1868), L.R. 7 Eq. 270; *Low v. Routledge* (1865), L.R. 1 Ch. 42; *Wood v. Boosey* (1867), L.R. 2 Q.B. 340; R.S.O. 1897, vol. III., part IV., p. xliv.; that there was no evidence to satisfy the requirements of sec. 18 of Imp. 5 & 6 Vict. ch. 45, namely, that the contributors were employed on the terms that the copyright should belong to the proprietors of the Encyclopædia, and that the contributors were paid; and that in the absence of such employment and payment, there is no copyright in the plaintiffs: *Brown v. Cooke* (1846), 16 L. J. N. S. Ch. 140; *Richardson v. Gilbert* (1851), 1 Sim. N. S. 336; *Walter v. Howe* (1881), 17 Ch. D. 708; *Collingridge v. Emmott* (1887), 57 L. T. 864; *Trade Auxiliary Co. v. Middlesborough, etc., Protection Association* (1888), 40 Ch. D. 425; *Lamb v. Evans*, [1893] 1 Ch. 218; *Trade Auxiliary Co. v. Jackson* (1887), 4 Times L.R. 130; *Bishop of Hereford v. Griffin* (1848), 16 Sim. 190; *Aflalo v. Lawrence & Bullen (Limited)*, [1902] 1 Ch. 264; that there had been such delay and acquiescence on the part of the plaintiffs as to disentitle them to maintain the action; Copinger on Copyright, 3rd ed., p. 280; *Beard v. Turner* (1866), 13 L. T. N. S. 747; and that in any case there could be no order for delivery up of copies, because there was no demand under sec. 23 of Imp. 5 & 6 Vict. ch. 45, and that

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there could be no judgment for an account of profits, the plaintiffs' remedies being limited to those given by sec. 17 of Imp. 5 & 6 Vict. ch. 45, and injunction.

A. Mills, for the defendant Hales.

Barwick, in reply, contended that the agreement between the copyright owners and the licensees was not an assignment but a license only: MacGillivray on Copyright, pp. 81, 82; that there had been no such acquiescence here as barred the plaintiffs: *Hogg v. Scott* (1874), L. R. 18 Eq. 444; Copinger on Copyright, 3rd ed., pp. 259, 282; MacGillivray, *ib.*, p. 87; Copinger, *ib.*, pp. 284, 286; that copyright existed in the compilation without the ownership of articles: Imp. 5-6 Vict. ch. 45, sec. 18; MacGillivray, *ib.*, pp. 57, 110; Copinger, *ib.*, p. 78; and that the provisions of the Imperial Customs Consolidation Act do not apply to Canada: Imperial Statutes, 8-9 Vict. ch. 93, sec. 63; 9-10 Vict. ch. 94; 16-17 Vict. ch. 107, secs. 181-190; 20-21 Vict. ch. 62, sec. 15; 39-40 Vict. ch. 36, secs. 151-284; also 10-11 Vict. ch. 31 (C.), proclaimed March 18th, 1848, to come into force on April 5th, 1848: *Canada Gazette*, 1848, p. 5197.

January 26. STREET, J.:—The present action was begun on September 18th, 1901, and it appears that the firm of Hales & Sparrow, who had been importing into Canada an American reprint of the plaintiffs' Encyclopædia, had, a little more than a year before the issue of the writ in the present action, formed the Imperial Book Co., Limited, who are defendants in this action, along with James Hales, and that upon the formation of that company it took over their business, and since it did so, Hayes & Sparrow have not, nor has the defendant James Hales, imported the book in question. He has pleaded the 26th section of the Copyright Act, which requires actions for breaches of it to be brought within one year, and I think there is therefore nothing proved against him for which he can be held liable. He is the president of the defendant company, and anything he has done within the year has been done in that and not in his individual capacity. The Imperial Book Co., Ltd., have, however, continued to import large numbers of copies of the reprint since September 1st, 1900.

A certificate purporting to be signed by the registering officer appointed by the Stationers' Company, pursuant to the 11th section of the Copyright Act of 1842, is produced and given in evidence, setting forth a copy of an entry made in the Book of Registry of Copyrights and Assignments kept at the Hall of the Stationers' Company, pursuant to the said section, which is as follows:—

“Time of making the entry. April 5th, 1875.

Title of book. The Encyclopædia Britannica: a dictionary of arts, sciences and general literature. Ninth edition.

Name of publisher and place of publication. Adam & Charles Black, Edinburgh.

Name and place of abode of the proprietor of the copyright. Adam & Charles Black, Edinburgh.

Date of first publication. January 30th, 1875.”

This certificate is given by the plaintiffs in evidence as *primâ facie* proof, under the 11th section of the Act, of their proprietorship of the copyright.

It is objected by the defendants that it is necessary for the plaintiffs to prove *dehors* this certificate that they are in fact proprietors of the copyright, because under the 18th section proprietorship in the copyright of an encyclopedia is only acquired by the proprietor of the work under the circumstances set forth in that section. I am of opinion, however, that the production of the certified copy of the entry in the Book of Registry at Stationers' Hall is all that is necessary to make out a *primâ facie* proprietorship in the copyright of an encyclopedia under secs. 18 and 19, as it is under sec. 11 to make out a *primâ facie* proprietorship in the copyright of a book: for this facility of proof is one of the benefits of the registration at Stationers' Hall referred to in the 19th section of the Act.

A number of English cases were cited by counsel for the defendants in support of his argument that the production of a copy of the entry at Stationers' Hall did not do away with the necessity of proving by direct evidence, other than the copy of the entry, the facts, which by the 18th section of the Copyright Act of 1842, Imp. 5-6 Vict. ch. 45, are conditions precedent to the vesting of the copyright in one who is not the author. It certainly is a matter of some surprise to find so

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little reference in the cases upon the subject to the effect given by the statute to copies of the entry at Stationers' Hall as *prima facie* evidence of the proprietorship of the copyright. In the case of *Sweet v. Benning* (1855), 16 C.B. 459, in which copyright was claimed in the weekly paper called *The Jurist*, under section 18 of the Copyright Act, Imp. 5-6 Vict. ch. 45, by the proprietors of the paper, who were not the authors of the articles in it, it is stated by Mr. Lush, one of the counsel for the plaintiffs, with whom was Mr. Sergeant Byles, that the entry of the paper at Stationers' Hall was, by the 11th section of the Act, made *prima facie* evidence of the proprietorship of copyright, and that the question in the case, therefore, was whether there was anything in the case to rebut the *prima facie* proof. This view of the statute seems to have been accepted by the opposing counsel and the Court, and the case turned upon the inferences to be drawn from the admitted facts. The other cases which were cited do not appear to contain anything inconsistent with this statement of the plaintiff's counsel in *Sweet v. Benning*.

The earliest case cited is *Brown v. Cooke*, 16 L.J.N.S. Ch. 140, decided December 23rd, 1846, in which a motion for an injunction was made before V.-C. Wigram by the registered proprietor of a newspaper to restrain the publication in another newspaper of articles appearing in the plaintiff's paper. The injunction was refused upon the ground that it did not appear upon the plaintiff's affidavit that the articles copied by the defendants, which had been supplied by various writers to the editor of the plaintiff's paper, whose contract with the plaintiff required him to supply the articles himself, had been paid for by the plaintiff. There was nothing to the contrary in the affidavit, but the Vice-Chancellor thought that it was necessary upon a motion for injunction that the plaintiff should in his affidavit set out his title fully, and so he refused the injunction.

The Trade Auxiliary Company v. Jackson, 4 Times L.R. 130, was a case of the same sort, and was also decided upon a motion for injunction.

There the defendants had copied from an unregistered circular, published by third parties with the consent of the plaintiffs, being itself a copy of the plaintiffs' newspaper. Mr.

Justice Kay, before whom the motion was made, expresses doubt as to the right of the plaintiffs to succeed under these circumstances: but he adds that there is the further objection that the plaintiffs have not upon their material brought themselves within section 18 of the Copyright Act, Imp. 5-6 Vict. ch. 45, and he refused the injunction.

The principles which were acted upon in refusing these two injunctions seem to be thoroughly sound: they are the same as those laid down by Lord Chancellor Cottenham in *Spottiswoode v. Clarke* (1846), 2 Ph. 154, 156, and are well worth repeating here. He says: "I have often expressed my opinion, that, unless a case of this kind, depending upon a legal right, is very clear, it is the duty of the Court to take care that the right be ascertained before it exercises its jurisdiction by injunction. The first question to be determined is as to the legal right, and if the Court doubts about that, it may commit great injustice by interfering until that question has been decided."

In the two cases to which I have referred, the Judges who refused the injunctions asked for were not satisfied to grant injunctions upon a mere *prima facie* case.

In *The Bishop of Hereford v. Griffin*, 16 Sim. 190, and in *Trade Auxiliary Company v. Middlesborough and District Tradesmen's Protection Association*, 40 Ch. D. 425, and in *Aflalo v. Lawrence & Bullen (Limited)*, [1902] 1 Ch. 264, and in *Coote v. Judd* (1883), 23 Ch. D. 727, the actual facts upon which the claim to copyright under the 18th section was based were before the Court, and were, of course, acted upon without reference to the *prima facie* case.

In *Walter v. Howe*, 17 Ch. D. 708, which was an action brought on behalf of *The Times* newspaper for republication of a life of Lord Beaconsfield which appeared in its columns, there was no registration of the newspaper at Stationers' Hall. In *Lamb v. Evans*, [1892] 3 Ch. 462, the determination was of a question not arising under the Copyright Act. In *Collingridge v. Emmott*, 57 L.T.N.S. 864, the plaintiff's registration at Stationers' Hall of the work in question was held to be defective, and so no rights could have been claimed under a copy of it. *Richardson v. Gilbert*, 1 Sim. N.S. 336, seems to have

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involved merely a question as to the sufficiency of the allegations in the Bill and not any question of proof.

In the present case the plaintiffs Adam & Charles Black assert in their statement of claim that they are proprietors of the copyright in the *Encyclopædia Britannica*: the defendants deny it, and the plaintiffs produce a copy of the entry in the book at Stationers' Hall as evidence of the right they claim. There is no evidence on either side upon this point except this copy, and I think that is sufficient to establish the plaintiffs' right.

Their title to the copyright being therefore established, the first objection on the part of the defendants to their right to maintain this action is that the effect of an agreement entered into between Messrs. Adam & Charles Black and their co-plaintiffs the Clarke Company, Limited, dated February 21st, 1899, was to transfer the copyright to that company: that Messrs. Adam & Charles Black cannot maintain the action because they have assigned the copyright to the Clarke Company: and that the Clarke Company cannot maintain the action because they have not registered the assignment at Stationers' Hall.

I have examined the agreement in question, and I am of opinion that it is not to be treated as an assignment but merely as a license. In this agreement Messrs. A. & C. Black are called the publishers, and the Clarke Company are called the company: by the agreement the publishers agree that until December 31st, 1912, the company shall have the exclusive right to print and sell the 9th edition of the *Encyclopædia Britannica*, and for the purpose of enabling them to print it the publishers agree to deliver to the company the existing plates used in its publication: and not to publish or announce the publication of a 10th edition of the work until after December 31st, 1912. The company on its part agrees not to alter the text of the work, and that the style of paper, printing and binding shall remain unaltered: that they will pay £40,000 to the publishers for the rights acquired under the agreement: that they will not sell any copy of the work under £15 either in Great Britain or America, and that they will as soon as possible after December 31st, 1912, deliver to the publishers

any unsold copies of the work and all the plates used in printing it then in their possession. The company further agrees that they will not knowingly issue any advertisement of and concerning the work of a nature likely to do injury to the publishers either in their business or as the owners of the copyright of the work. Authority is also given to the company to institute in the names of the publishers any proceedings they may deem proper in respect of any breach of copyright of the work.

The duration of the copyright was forty-two years, from January 30th, 1875, the date of first publication—that is to say, until January 30th, 1917. The rights given to the company under the agreement will therefore expire nearly four years before the expiration of the copyright, and the publishers have provided in the agreement with much care for the protection and preservation of their interest in the work by reason of any alteration by the company in its substance or form or selling value.

They have expressly reserved the copyright to themselves, and this reservation is entirely consistent, it appears to me, with the full enjoyment by the company of the rights given them. The agreement therefore must, in my opinion, be construed as a license merely and not as an assignment: *Stevens v. Benning* (1854), 1 K. & J. 168; *Hole v. Bradbury* (1879), 12 Ch. D. 886; *Cooper v. Stephens*, [1895] 1 Ch. 567; *Trade Auxiliary Company v. Middlesborough and District Tradesmen's Protection Association*, 40 Ch. D. 425, at p. 434; *MacGillivray on Copyright*, pp. 80, 81, 82.

It is further objected that the plaintiffs are not entitled to the relief they ask, because the edition of the *Encyclopædia Britannica* sold by the defendants was printed in the United States and imported into Canada: and the plaintiffs, it is alleged, did not give notice to the Commissioners of Customs of the existence of their copyright, and of the proper date of its expiration, as required by sec. 152 of the *Imperial Customs Laws Consolidation Act*, 39 & 40 Vict. ch. 36.

If that Act were in force in Canada, I think it would be an answer to the plaintiffs' claim in this action, because under section 152 of it, it is expressly declared that foreign reprints

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of books entitled to British copyright are not prohibited from being imported into the British possessions unless notice has been given to the Commissioners of Customs of the existence of the copyright and the date when it will expire. Now, it appears from the Blue Book produced by the plaintiffs as evidence of the giving of this notice, that the date of the expiration of the copyright is stated as being "January 30th, 1924." Assuming that the fact of the giving of the notice is sufficiently proved by the production of this Blue Book, which is denied by the defendants, the objection remains that the date given is wrong. The first publication of the first number of the Encyclopædia as registered at Stationers' Hall was January 30th, 1875, and the duration of the copyright is forty-two years from that date, so that the proper date of expiration is January 30th, 1917. An erroneous statement of the date of the expiration of the copyright in the notice is clearly not a compliance with the condition imposed by section 152 of the Customs Act, and therefore, as I have said, if that Act were in force in Canada, the objection would, it seems to me, be fatal to the plaintiffs' right to recover: because section 152 being an enactment *in pari materia* with section 17 of the Copyright Act of 1842, must be read in connection with it, and as an essential part of the legislation upon the subject.

In considering whether section 152 of the Customs Consolidation Act of 1876 is in force in Canada, I find at the outset that in part IV. of the appendix to vol. III. of the Revised Statutes of Ontario, 1897, headed, "Table of Imperial statutes . . . appearing to be in force in Canada *ex proprio vigore* at the end of 1901," this sec. 152 of 39 and 40 Vict. ch. 36, is included: and this expression of opinion on the part of the learned commissioners who prepared the table, although not binding upon me, and not accompanied by their reasons, has made me hesitate a good deal before arriving, as I have done, at a different conclusion.

Section 152 is as follows: "Any books wherein the copyright shall be subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, shall be and are hereby absolutely prohibited to be imported into the British Possessions abroad: provided always

that no such books shall be prohibited to be imported as aforesaid, unless the proprietor of such copyright, or his agent, shall have given notice in writing to the Commissioners of Customs that such copyright subsists, and in such notice shall have stated when the copyright will expire: And the said Commissioners shall cause to be made and transmitted to the several ports in the British Possessions abroad, from time to time to be publicly exposed there, lists of books respecting which such notice shall have been duly given, and all books imported contrary thereto shall be forfeited: but nothing herein contained shall be taken to prevent Her Majesty from exercising the powers vested in her by the 10th and 11th Vict. ch. 95, intituled 'An Act to amend the law relating to the protection in the Colonies of works entitled to copyright in the United Kingdom' to suspend in certain cases such prohibition."

This section, standing by itself, no doubt extends to Canada: the previous section, however, being section 151, seems to me, when taken along with the interpretation clause, section 284, to exclude the Act from applying to Canada. In the interpretation clause the words "Customs Acts" when used in the Act are declared to "mean and include this and all or any other Acts or Act relating to the Customs" when not inconsistent with the context or subject-matter. Then by section 151 it is provided as follows:—

"151. The Customs Acts shall extend to and be of full force and effect in the several British possessions abroad, except . . . as to any such possession as shall by local Act or ordinance have provided, or may hereafter with the sanction and approbation of Her Majesty and her successors, make entire provision for the management and regulation of the customs of any such possession, or make in like manner express provisions in lieu or variation of any of the clauses of the said Act for the purposes of such possession."

The late Province of Canada was brought clearly within this exception by the statute of the Province, 10 & 11 Vict. ch. 31, by which, in pursuance of the authority conferred by the Imperial statute, 9 & 10 Vict. ch. 94, the application of the Imperial customs theretofore imposed was terminated, and

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entire provision was made for the present and future regulation of the customs of the Province by the provincial legislature. It was provided by the Provincial Act, 10 & 11 Vict. ch. 31, that it should not take effect until a proclamation should be issued by Her Majesty, and this proclamation was made on 18th March, 1848, bringing the Provincial Act into force on April 5th, 1848: see *Canada Gazette* for 1848, p. 5197.

I can find no reason in the context or subject-matter of section 152 of the Customs Consolidation Act requiring me to say that it ought to be held to be in force in Canada notwithstanding section 151, under the circumstances above set forth; and I am therefore obliged to conclude that it never was in force here, because Canada had with the assent of Her Majesty assumed entire control of its own customs before the Customs Consolidation Act of 1876 was passed.

The elimination of the provisions of section 152 of the Customs Consolidation Act from the consideration of the plaintiffs' rights leaves section 17 of the Copyright Act of 1842, Imp. 5-6 Vict. ch. 45, as governing them as against the defendants. I leave section 15 of the Act out of the question, because that section applies only to books subject to British copyright which are unlawfully printed in the British dominions, and does not extend to books subject to British copyright which are printed in foreign countries.

Section 17 declares "that it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the said United Kingdom wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and if any person not being such proprietor or person authorized as aforesaid, shall import or bring or cause to be imported or brought, for sale or hire, any such printed book into any part of the British dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish or expose to sale or let to hire, or have in his possession for sale or hire any such book." . . . under penalty of forfeiture, etc.

It has been proved beyond question in the present action that the defendants, without authority from the plaintiffs, the proprietors of the copyright in the ninth edition of the Encyclopædia Britannica, have imported into Canada for sale, and have there sold large quantities of a copy or reprint of that work which have been printed in the United States.

The defendants set up in their answers that the English Copyright Act of 1842, Imp. 5-6 Vict. ch. 45, is not in force in Canada, and that the plaintiffs can only claim such rights as are conferred by Canadian statutes upon them. This objection is, however, one which has been determined adversely to the view suggested by the defendants, and I am unable to entertain it: *Routledge v. Low* (1868), L.R. 3 H.L. 100; *Smiles v. Belford*, 1 A.R. 436; *Morang v. Publishers' Syndicate*, 32 O.R. 393.

The next objection taken is that the plaintiffs have dis-entitled themselves to recover by reason of delay amounting to acquiescence. I can find, however, in the evidence no definite statement of anything of the kind. By reason of the agreement between Messrs. A. & C. Black and their co-plaintiffs, the latter were the persons most directly concerned in enquiring into the acts of persons infringing the copyright, and we have the statement of Mr. H. E. Hooper, the managing director of the Clarke Company, that he did not know that the defendants' reprint was being sold extensively in Canada until just before the defendants were notified of the plaintiffs' intention to proceed against them. It is, of course, also to be borne in mind that the degree of delay which might stand in the way of the success of a motion for an interlocutory injunction would by no means necessarily be an answer to an action: see *Hogg v Scott*, L.R. 18 Eq. 444; and here whatever delay has taken place on the part of the Blacks after they seem to have heard reports of the sale of pirated copies in Canada, are far from sufficient to establish acquiescence on their part.

I think the plaintiffs have established their right to an injunction perpetually restraining the defendants, the Imperial Book Co., Limited, their servants and agents, from importing into Canada any copies of the Encyclopædia Britannica, ninth edition, or of any parts thereof printed in any country outside the British dominions which infringe the copyright of the

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plaintiffs Adam & Charles Black ; and ordering the said defendants, the Imperial Book Co., Limited, to deliver up for cancellation all and any copies so printed in their possession. The plaintiffs are also entitled to an account of the profits realized by the defendants, the Imperial Book Co., Limited, from the sale of any such copies within one year before the commencement of this action. This is an equitable remedy to which the plaintiffs' seem entitled under the authorities, although it is not specially given by the Act, because the importation by the defendants is declared to be unlawful, and the plaintiffs have been injured by their unlawful act: *Colburn v. Simms* (1843), 2 Hare 543; McLaughlin on Copyright, p. 86; Copinger on Copyright, 3rd ed., p. 301.

The defendants, the Imperial Book Co., Limited, must also pay the costs of the action to the hearing inclusive.

Should the plaintiffs' require it, there will be a reference to ascertain the profits realized by the Imperial Book Co., Limited, and the costs of the reference will be reserved.

The action will be dismissed as against the defendant Hales. He has, however, made large profits out of the sale of the unlawfully imported copies of the plaintiffs' book, and escapes accounting for them by pleading the statute, and under the circumstances I think he should pay his own costs.

A. H. F. L.

[IN CHAMBERS.]

IN RE HANNAH HUNT.

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Jan. 26.

Will — Legatee predeceasing Testatrix — Right of Husband and Children of Deceased Legatee

A testatrix by will made in 1901, directed her estate to be divided into four equal shares and one share to be paid to each of her four children. One of the latter predeceased her intestate leaving a husband and two children:—*Held*, that by virtue of section 36 of the Wills Act, R.S.O. 1897, ch. 128, the husband of the deceased child took one-third of one-quarter share in the estate of the testatrix, his two children taking the rest.

THIS was an application by the executors of the will of Hannah Hunt for direction under Con. Rule 938. The testatrix by her will dated March 23rd, 1901, directed that her estate should be divided into four equal shares, and that one share should be paid to each of her four children, naming them. She died on March 23rd, 1902. Susannah Jewell, one of her daughters, died intestate on April 2nd, 1902, leaving a husband and two infant children. The executor now applied for direction as to whether John Jewell, the husband, took a share in one-fourth of the estate of the testatrix, his wife having predeceased the latter.

The matter was argued before STREET, J., in Chambers, on January 26th, 1903.

F. S. Mearns, for John Jewell and the executors.

F. W. Harcourt, for the infants.

The following cases were cited on the argument: *Eager v. Furnival* (1881), 17 Ch. D. 115; *Johnson v. Johnson* (1843), 3 Ha. 157; *In re Scott*, [1901] 1 K. B. 228; also R.S.O. 1897, ch. 128, sec. 36.

Per Curiam. The one-fourth share of the estate of the testatrix which would have gone to Susannah Jewell, had she survived the testatrix, was by virtue of sec. 36* of the Wills

*R.S.O. 1897, c. 128, s. 36: Where any person, being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such

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Act, R. S. O. 1897, ch. 128, divisible between her surviving husband and her children, the husband taking one-third.

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[DIVISIONAL COURT.]

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Feb. 2.

REX V. HAYES.

Conviction—Importing Aliens under Contract to Labour—Scienter—Irregularity
60-61 Vict. ch. 11 (D.)—1 Edw. VII. ch. 13 (D.).

Conviction of defendant under 60-61 Vict. ch. 11 (D.), as amended by 1 Edw. VII. ch. 13 (D.), for unlawfully causing the importation of an alien from the United States into Canada under contract to perform labour in Canada by working at a factory, quashed as bad on its face, because not stating that he “knowingly” did the act charged, which indeed neither did the information allege.

Held, also, that this omission from the information and conviction was not a mere irregularity or informality or insufficiency within the meaning of section 889 as the Criminal Code, 55-56 Vict. ch. 9 (D.).

On August 25th, 1902, the defendant Hayes was convicted by George T. Denison, Esq., police magistrate at Toronto, for that he did at the city of Toronto and at other places unlawfully prepay the transportation and assist and encourage the importation and immigration of Frederick De Rocher, an alien and foreigner, from the United States of America into Canada under contract and agreement made previous to the importation and immigration of the said alien and foreigner to perform labour and service in Canada, viz., to act as a workman at the factory of the Toronto Carpet Manufacturing Co., Limited, in said city of Toronto, in the service and employ of the said company, contrary to the form of the statute in such case made and provided. A fine of \$50 and costs was imposed. Upon the application of the defendant the conviction and papers were

person, dies in the lifetime of the testator leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

brought into the High Court by *certiorari*, and a motion was made to quash the conviction upon the following grounds:—

1. That Frederick De Rocher was not an alien or a foreigner, but was a Canadian and a British subject.

2. That there was no contract by the defendant Hayes with De Rocher prior to his importation that he should perform work or labour in Canada.

3. That there was no evidence that the United States have enacted and retained in force laws of a character similar to the Act under which the conviction was made.

4. That the United States laws given in evidence were not similar in character to the Act under which the conviction was made.

5. Similar to 3 and 4.

6. That Hayes supposed De Rocher to be a British subject.

7. That it was not Hayes but a brother of De Rocher who brought him in.

8. and 9. Denying any offence against the law.

The evidence shewed that the defendant went to Lowell, Mass., U.S., and engaged Frederick De Rocher and his brother Pierre to come to Toronto to work at the Toronto Carpet Co.'s factory, and that at Lowell he paid their fares to Toronto, and that upon their arrival in Toronto they were placed by the defendant in charge of a man who took them to a boarding-house, and that they were put to work in the factory. It appeared, also, that Frederick De Rocher was born in June, 1877, at Thompsonville, Connecticut, and that his parents were born in Canada, and had resided for several years in the United States, and that he himself had always resided there.

The motion was heard on January 15th, 1903, before a Divisional Court consisting of STREET and BRITTON, JJ.

G. H. Watson, K.C., for the motion.

J. G. O'Donoghue, for the prosecutor.

The argument proceeded upon the points whether the remedy by *certiorari* lay in this case; and whether it must be presumed that Frederick De Rocher was still a British subject, because though born in a foreign country he was born there of

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parents who were presumably British subjects; and upon the fact that the only evidence given of the state of the law in the United States was not sufficient to satisfy the requirements of 60-61 Vict. ch. 11, sec. 9 (D.), which confines the operation of the Act to such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada of a similar character—inasmuch as the only evidence given of the kind was the production and filing of a pamphlet issued by the Treasury Department, entitled “Immigration Laws and Regulations,” dated April 9th, 1900, and purporting to be printed at the Government printing office at Washington, 1900. The decision of the case, however, was based upon other grounds.

February 2. STREET, J. [after stating the facts of the case as above:]—The 1st section of ch. 11 of 60 & 61 Vict. (D.) is as follows:—

“From and after the passing of this Act it shall be unlawful for any person . . . in any manner to prepay the transportation, or in any way to assist or, encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation or immigration of such alien or foreigner, to perform labour or service of any kind in Canada.”

The 3rd section of the same Act as amended by ch. 13 of 1 Edw. VII. (D.) is as follows:—

“For every violation of any of the provisions of section 1 of this Act, the person . . . violating it by *knowingly* assisting, encouraging or soliciting the immigration or importation of any alien or foreigner into Canada to perform labour or service of any kind under contract or agreement, express or implied, parole or special, with such alien or foreigner, previous to his becoming a resident in or a citizen of Canada, shall forfeit and pay a sum not exceeding \$1000 nor less than \$50.”

And by sub-sec. 3 of sec. 3 as so amended, it is provided that such sum may, with the written consent of the Attorney-General of the Province, be recovered upon summary conviction before a police magistrate.

The offence of importing aliens under a contract to do work in this Province is a new offence created by the statutes in question, and it is an essential element in the offence that it shall be done "knowingly:" so that unless done "knowingly" it is no offence at all. In the present case the information does not charge the defendant with having "knowingly" done the acts charged, nor is he convicted of having "knowingly" done them: so that he has not been either charged with, or convicted of, any offence known to the law, and the conviction on its face is clearly bad: *Carpenter v. Mason* (1840), 12 Ad. & El. 629; *Reg. v. Justices of Radnorshire* (1840), 9 Dowl. P.C. 90.

The next question is whether the conviction is aided by sec. 889 of the Criminal Code, 55-56 Vict. ch. 9 (D.) which directs that no conviction on being removed by *certiorari* shall "be held invalid for any irregularity, informality or insufficiency therein, provided that the Court or Judge before which or whom the question is raised is upon perusal of the depositions satisfied that an offence of the nature described in the conviction . . . has been committed over which such Justice has jurisdiction."

I have been unable to come to the conclusion that the omission from the information and the conviction of one of the essential elements of the offence is either an irregularity, an informality, or an insufficiency. I think that it is not a matter of form merely but of substance: and that it is a fatal and incurable defect in the conviction. The police magistrate has never been required to pass upon the question as to whether the defendant is guilty of an offence under the statute or not: he has only been required to pass upon one-half of the facts necessary to make out the charge against the defendant. It is entirely consistent with the charge and the conviction that the defendant is innocent of any offence at all. It seems to me that such a state of things is not that which is intended by the descriptions "irregularity," "informality," and "insufficiency," and it is widely distinguishable from the specimen objections given in sec. 890.

In case, however, I should be wrong in this view, I think it proper to say that having carefully considered the depositions I am not satisfied that the defendant has been shewn to have

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knowingly assisted, encouraged or solicited the importation of any alien or foreigner into Canada. The evidence shews that the defendant went from Toronto to Lowell, Mass., for the purpose of engaging French-Canadian workmen to work in the carpet factory here: that he engaged Pierre De Rocher, a French-Canadian, born in Canada of French-Canadian parents, and that at Pierre De Rocher's request he also engaged Frederick De Rocher, Pierre's brother, believing at the time that Frederick also was born in Canada of French-Canadian parents. It now appears that Frederick De Rocher was born in the United States, but that his parents were born in Canada. There is no evidence that either he or his parents were ever naturalized in the United States. The presumption from the only facts in evidence is that his parents are British subjects though residing in the United States, and that therefore Frederick De Rocher is a British subject: Dicey's Conflict of Laws, 1896, p. 178; 2 Steph. Comm., 12th ed., p. 406.

There is, therefore, every reason for the conclusion that the defendant believed when he engaged Frederick De Rocher to come to Toronto that he was only bringing back to Canada a British subject residing in the United States. The Act under which this prosecution is brought is directed only against the importation of aliens and foreigners; and one who is a British subject is neither an alien nor a foreigner although he happen to be living abroad: Anderson's Dictionary of Law; Black's Law Dictionary.

The conviction must, therefore, be quashed as being bad upon its face by reason of a defect which the evidence does not enable us to disregard, and the prosecutor should pay the costs.

There will be the usual order protecting the magistrate.

BRITTON, J., concurred.

A. H. F. L.

[BRITTON, J.]

SMITH V. CAREY.

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Jan. 6.

Penalties—Ontario Election Act—Person Voting Knowing that he has no Right to Vote—Wilfully Voting without Qualification—Agent at Poll—Certificate—Neglect to Take Oath of Qualification—Reduction of Penalty.

The defendant, having shortly before an election for the Legislative Assembly of Ontario removed from his farm in the neighbourhood of a city into the city itself, applied for and obtained registration as a city voter, not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situated, at a polling place other than that for the subdivision in which he had formerly resided, and received from the returning officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, and voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could not vote:—

Held, that the defendant was not liable to the penalty imposed by sec. 168 of the Ontario Election Act, R.S.O. 1897, ch. 9, for voting knowing that he had no right to vote.

South Riding County of Perth (1895), 2 E. C. 30, followed.

2. That the defendant was not liable to the penalty imposed by sec. 181 of the Act, for wilfully voting without having at the time all the qualifications required by law. "Wilfully voting" as in this section, and applying it to the facts of the case, was practically the same as voting knowing that he had no right to vote.
3. That the defendant was liable to the penalty of \$400 imposed by sec. 94, sub-sec. 5, of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate; but, as the defendant was not asked to take the oath, the deputy returning officer not having been aware that it was necessary, and the plaintiff himself was present when the defendant voted, and did not object, the provisions of R.S.O. 1897, ch. 108, should be applied, and the penalty reduced to \$40.

AN action for the recovery of penalties under the Ontario Election Act, R.S.O. 1897, ch. 9, and amendments. The facts are stated in the judgment.

The action was tried by BRITTON, J., without a jury, at Kingston, on the 1st October, 1902.

John McIntyre, K.C., and *E. H. Smythe*, K.C., for the plaintiff.

J. L. Whiting, K.C., and *J. McDonald Mowat*, for the defendant.

January 6. BRITTON, J.:—What is complained of took place at the election which was held on the 22nd and 29th days of May, 1902, of a member to serve in the Legislative Assembly of the Province of Ontario for the electoral district of the county of Frontenac.

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The candidates were John S. Gallagher and William I. Shibley.

The plaintiff is a voter residing within the electoral district, and in the election acted as the financial agent for the candidate John S. Gallagher.

The defendant, at the time of the election and for five or six months before, resided in the city of Kingston, and was not a resident of the electoral district of Frontenac.

The plaintiff alleges:

1. That the defendant, being a non-resident of the electoral district, voted at the election, knowing that he had no right to vote, thereby subjecting himself to a penalty of \$100 under sec. 168 of the Act.

2. That the defendant wilfully voted at that election without having, at the time, all the qualifications required by law for entitling him so to vote—that is, not having the qualification of residence—thereby subjecting himself to a penalty of \$200 under sec. 181 of the Act.

3. That the defendant, upon the allegation by him that he had been appointed an agent of the candidate William I. Shibley, received from the returning officer a certificate to vote at the poll in polling sub-division No. 5 in the township of Kingston, in the said district, and the defendant voted at said poll without having taken, at the polling place and before he voted, any oath of qualification prescribed to be taken by voters, thereby subjecting himself to a penalty of \$400 under sec. 94, sub-sec. 5, of the Act.

There are not in this case many questions of fact in dispute.

The defendant, prior to his removal to the city and taking up his residence there, resided in the township of Kingston, within the electoral district of Frontenac. His name was on the assessment roll for 1901 for that township, and was on the last revised list of voters for either polling subdivision No. 1 or polling subdivision No. 2, being the polling subdivision known as "Bath Road."

The defendant was a friend of the candidate Shibley, and, being well acquainted with the township electors, was asked to act as agent for Shibley at polling subdivision No. 5. The defendant says that nothing was then said to him about his

own vote, and he did not think his name was on for the township, as he had sold his farm. He was not aware that non-residence was a disqualification, but, thinking that his name was not on the list for the township, he assumed for the time that he could not vote there.

Upon the registration of voters for the city, just prior to the election, he applied for and obtained registration as a city voter. He then took the oath that he had not been entered or registered on any list of persons entitled to vote at the election, under which entry or registration he could vote in any other municipality in the Province at this election. He says his name was not, to his knowledge or belief, then upon the township list. I believe this statement of the defendant. He was well known in city and township. He is not shewn to have been active, politically, in the city, and nothing appears to warrant the conclusion that in applying for registration in the city he was doing, or desired or intended to do, anything wrong.

After having consented to act as agent for Shibley at polling subdivision No. 5, he was furnished in due course with the usual authority to so act, and he also received a certificate from the returning officer permitting him to vote at that polling subdivision, instead of the Bath Road polling subdivision. That was the first knowledge he had, during the election, that his name was continued on the township list, and he says that he thought that if his name was there he had a legal right to vote there, and, with the authority of the returning officer to vote at polling subdivision No. 5, he could do so. He says he did not know that residence was necessary, and he did not know that a person could not vote in more than one electoral district.

When the defendant tendered his vote at polling subdivision No. 5 the plaintiff was present. No one objected. The plaintiff's account of the voting is, that the defendant came into the polling place, gave his papers to the deputy returning officer, and said he had come to act as agent for Mr. Shibley, and that he wanted to vote. The deputy returning officer examined the papers, and then administered the oath of secrecy to the defendant. The plaintiff further says that, before the defendant voted, he, the plaintiff, asked him where he resided, and the defendant said "on the Bath Road."

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The defendant says the conversation was that the plaintiff asked him where his name appeared, and the defendant answered: "I think subdivision No. 1; that is, on the Bath Road. I am not sure of the subdivision, whether 1 or 2, but Bath Road." The plaintiff looked it up, before the defendant voted, found it, and said it was all right.

Under all the circumstances, upon the evidence, I accept the defendant's version of the conversation. In my opinion, the defendant did not understand the question to be one of residence. He was well known. He had driven from the city to the poll. The matter was open and deliberate—in presence of acquaintances, friends of both candidates. I am of opinion that he understood the plaintiff's question to be in reference to where his, defendant's, name appeared on the list, and not as to his then place of residence. No other oath than that of secrecy was administered or tendered or discussed. If the oath of qualification had been tendered, the question of residence would have come up, and the defendant says that he would have refused that oath, as now understood by him, and, if he had been informed, either by the oath or in any way, that a non-resident could not have voted, he would not have voted.

The three charges in this action are all for this same transaction.

As to the first, under sec. 168, I find that the defendant did not vote knowing that he had no right to vote. What is required, according to the decision in *South Riding County of Perth* (1895), 2 Ont. Elec. Cas. 30, 33, is "actual knowledge by the voter that he was doing something that is forbidden, not merely proof that the vote is bad and that the voter knows the facts which in law make it so, but that the voter knew he was casting it without having the right to do so."

As to the second charge. Upon the same facts and for the same voting the plaintiff claims the penalty of \$200. This is for wilfully voting without having the necessary qualification, and in this case it was residence. It is at once apparent that the act against which sec. 181 is aimed is worse than voting as a non-resident, knowing he had no right to vote, because the penalty is \$200, instead of \$100. An explanation may possibly be found in this, that sec. 181, being with the group beginning

with sec. 171, dealing with disqualification for corrupt practices, may refer to such disqualification rather than something such as non-residence, which seems to be provided for by sec. 168. In the view I take of it, it is not necessary for me to decide that.

I hold that wilfully voting as in this section, and applying it to the facts in this case, is practically the same as voting knowing that he had no right to vote.

In *Wilson v. Manes* (1897), 28 O.R. 419, the action was against a returning officer at a municipal election for wilfully refusing a ballot paper to the plaintiff. It was held in that case that the duties of the returning officer were purely magisterial, and that for a breach of duty under the Act, an action would lie without malice. The word "wilful," there used, was in the sense of intentional, etc. That case was distinguished from *Johnson v. Allen* (1895), 26 O.R. 550, where "wilful" was held to mean "perverse" or "malicious."

In *In re Young and Harston's Contract* (1885), 31 Ch. D. 168, it was conceded that, although "wilful" in matters of contract where "wilful default" is mentioned, implies nothing blameable, and means only "that a man knows what he is doing," "that he intends to do what he is doing," and "that he is a free agent," yet in some branches of law it may have a special meaning. It has in this case. See *Lewis v. Great Western R.W. Co.* (1877), 3 Q.B.D. 195. If defendant did not know he had no right to vote, in the absence of any notice or prohibition, and when acting in apparently good faith, I do not think him guilty as charged.

The third claim is for the penalty prescribed by sec. 94, sub-sec. 5, which is as follows: "No person who receives a certificate under this section, whether as deputy returning officer, poll clerk, or agent, shall thereafter, either at the polling place named in the certificate, or at any other polling place, vote at the election, until he has taken at the polling place where he proposes to vote, one or two of the oaths of qualification prescribed to be taken by voters, and any person violating the provisions of this sub-section shall be subject to a penalty of \$400; and every vote cast in contravention of this sub-section shall be null and void."

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I need not stop to inquire what this sub-section is aimed at, or why it is necessary for any person who obtains such a certificate to take the oath of qualification before voting—whether asked to do so or not. The law is very plain; the defendant violated it, and so rendered himself liable to the penalty of \$400.

This seems to me to be a case for the application of R.S.O. 1897, ch. 108, in reducing the penalty. The plaintiff was present when the defendant voted. The plaintiff, acting as the agent for the candidate J. S. Gallagher, had a certificate from the returning officer entitling him to vote at that polling place, and he could not have voted there without that certificate. He did vote there, and did not before voting—or at any time—take either oath of qualification. The deputy returning officer at that polling place was not aware that it was necessary for agents voting under certificate to take the oath before voting. So far as appears, the requirements of this clause of the Election Act were entirely overlooked by everyone in the Frontenac election, until after it was over.

There is no suggestion of fraud or of intentional wrongdoing as to this omission. The now defendant, after the present action was commenced, brought his action against the plaintiff for the same omission on the part of the present plaintiff. That action was tried before me, and there is really no reason, unless upon the question of costs, why one, so far as it relates to this charge, should not be set off against the other. I will not do this, but, for reasons which seem to me sufficient, I reduce the penalty to \$40, and direct that judgment be entered for the plaintiff against the defendant for \$40 with full costs of suit.

The defendant is entitled to costs on the first and second charges, to be set off. The plaintiff shall get the general costs of the action against the defendant, but the defendant shall have the right to set off against plaintiff's costs, the costs, if any, incurred by reason of the two charges on which defendant succeeds.

I order that the said sum of \$40 and costs shall be paid by the defendant to the plaintiff within one month from this date.

E. B. B.

[BRITTON, J.]

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Jan. 6.

Penalties—Ontario Election Act—Bribery—Recovery of Penalty by Action—Agent at Poll—Certificate—Neglect to Take Oath of Qualification—Reduction of Penalty.

An action will not lie under sec. 195 of the Ontario Election Act, R.S.O. 1897, ch. 9, for the pecuniary penalty for the offence of bribery prescribed by sec. 159, sub-sec 2, as amended by 63 Vict. ch. 4, sec. 21, until after conviction.

The defendant was found guilty of bribery, on the evidence, and the claim for a penalty was dismissed without costs.

The defendant was held liable to a penalty of \$400 under sec. 94, sub-sec. 5, of the Act, for voting at a polling place where he was acting as an agent of a candidate, under a certificate of the returning officer, without having taken the oath of qualification, but the penalty was reduced to \$40, as in the preceding case.

AN action for penalties under the Ontario Election Act, R.S.O. 1897, ch. 9, and amendments thereto. The facts are stated in the judgment.

The action was tried before BRITTON, J., without a jury, at Kingston, on the 1st October, 1902.

J. L. Whiting, K.C., and *J. McDonald Mowat*, for the plaintiff.

John McIntyre, K.C., and *E. H. Smythe*, K.C., for the defendant.

January 6. BRITTON, J.:—In another action the now defendant sued the present plaintiff for penalties. That action was tried at the same assizes, and the remarks made by me in disposing of it, so far as applicable to this case, may be considered as made here.*

The complaint in this action is as to matters in the Provincial election for the county of Frontenac held on the 22nd and 29th May last, in which election John S. Gallagher and William I. Shibley were candidates.

The plaintiff charges:

1. That the defendant was guilty of bribery, in that he promised and gave money to one Eli Peters, a voter, to induce

*See the preceding case.

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Peters to vote for Gallagher at that election, the defendant thereby incurring the penalty of \$200 prescribed by sec. 159, sub-sec. 2, of the Ontario Election Act.

2. That the defendant, as agent of J. S. Gallagher, at the election, received from the returning officer a certificate entitling him to vote at polling subdivision No. 5 in the township of Kingston, and that he voted there without having taken one of the oaths of qualification, thereby rendering himself liable to a penalty of \$400, as prescribed by sec. 94, sub-sec. 5, of the Election Act.

Upon the facts I find the first charge established. Eli Peters is a feeble man, who was examined *de bene esse*, and his evidence so taken was read at the trial.

He was closely cross-examined and at great length by able counsel, without disturbing, to any material extent, his evidence given on examination in chief.

After stating that he is a voter, acquainted with the defendant, etc., etc., the material part of his evidence is as follows:—

Q. Did you see him (defendant) before the election? A. Yes. I saw him about the time, I think the day before.

Q. Did he speak to you about the election? A. Yes, he did say something about it, which was not of much account, something like "vote right."

Q. What did he say? A. He said that if I would vote, and vote right, I would not lose by it.

Q. What did he say more than that? A. He said that if I would vote, and vote right, he would do as well by me as he had done in the Avery election.

Q. What had he done for you in the Avery election? A. I having a good way to go home, he came to me some days afterwards and gave me \$3. He did not say what it was for, but I suppose it may have been for charity. This was in connection with the Avery election.

Q. Has he done as well for you in this election as he did in the Avery election for you? A. Not quite as well.

Q. How much has he given you? A. Well, he met me on the street some days after election day and gave me \$1; that was in Harrowsmith.

Q. How many times had you asked him for it? A. I do not remember asking him more than the once.

Q. Where was he when you asked him for it? A. It was in Harrowsmith, somewhere near his house.

Q. What did he say about the balance? A. He said he would give me the rest some time.

Peters's evidence is corroborated by that of one Sidney W. Davy as to the conversation before the election. Davy says he heard defendant say to Peters: "If you will do as well as you did in Avery's election, I will do as well as I did." Upon cross-examination Davy changes the exact words, but substantially the statement made by Davy to Peters, which Davy swears he heard, is: "You do the same as you did in the Avery election, and I will do the same for you."

Davy also swears to a conversation between "Jake" Peters, son of Eli, and the defendant, after the election, at Harrowsmith, in the course of which Jake told defendant that his father had sent him for the money due to him for the election, and the defendant said, "Keep away, don't bother me now," and shortly after, in the same interview, defendant asked Jake where his father was, and Jake said "up-town."

I would not consider the evidence of Davy, taken by itself, sufficiently strong corroboration to warrant a finding against defendant, if there had been point blank contradiction by defendant, and if there were no admissions by defendant. Apparently the facts did not permit the defendant to contradict Peters on very material points. The defendant, at first, simply did not remember saying to Peters "vote right, and I will do as well for you as I did in the Avery election," or words to that effect. He then said, "I have no recollection of saying that;" and afterwards, on being pressed by his counsel, he put it more strongly. But the defendant admits giving Peters \$3, after the Avery election, and he admits that Peters asked for it on account of the election. I have quoted what Peters says. There is no reasonable explanation of this gift of \$3, when made, apart from its being payment for Peters's vote at the Avery election. Then, defendant admits that on the day when Davy, according to his evidence, heard the conversation between "Jake" and the defendant, he, the defendant, went

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"up town," saw Eli Peters, and gave him \$1. He admits that Jake wanted money for his father, but says he wanted it to get his dinner with. The defendant was not shewn to be in the habit of giving sums of money upon such, or similar, requests. He was the financial agent of the candidate Gallagher. Why should the defendant pay for a dinner for Eli Peters? If disposed to give him his dinner, why give \$1, when dinner would cost only 25 cents? The defendant says the balance was to enable Eli Peters to get home. But, again, why was it necessary, or what is the explanation of its being necessary, that the defendant should see that Peters got home? He had not come at the defendant's request; his son Jake was strong and able to take care of his father. If Jake could contradict Davy, why was he not called by the defendant? If he could have explained why the \$1 was paid, in any other way than as told by his father, I think he would have been called.

I have no doubt whatever, after hearing the evidence of the defendant, that the story of Eli Peters is substantially true, and that the defendant is guilty and should be made liable for the penalty.

Now arises the question of law. Can I deal with the matter, either as to pecuniary penalty or the punishment by imprisonment, in this action?

Is the plaintiff authorized by sec. 195* to sue for this penalty as the first proceeding towards obtaining a conviction?

There is a wonderful variety in the wording of the different penal clauses of the Election Act. Each of secs. 24, 26, 40, 45, 46, 50, 66, 87, 149, 150, 154, 161, 165, 183, 184, 190, 192, and 193, says that the person violating "shall incur a penalty," etc. Section 155 deals with secrecy, making the violation of it punishable by imprisonment only, for a term not exceeding six months, on summary conviction before a stipendiary magistrate or a police magistrate, or two justices of the peace.

* 195. Subject to the provisions of sections 187 and 188:

1. All penalties imposed by this Act shall be recoverable with full costs of action, by any one who sues for the same in any of Her Majesty's Courts in this Province having competent jurisdiction; and in default of payment of the amount which the offender is condemned to pay, within the period to be fixed by the Court, the offender shall be imprisoned in the common gaol until he has paid the amount which he has been so condemned to pay and the costs.

Sections 162 and 163, in dealing with corruptly giving refreshments, say that the person offending "shall forfeit to any person who sues for the same" \$200 (sec. 162), \$10 (sec. 163), with full costs of suit.

Section 170 prohibits the selling or giving of liquor at an hotel on election day "under a penalty of \$100 for every offence; and the offender shall be subject to imprisonment not exceeding six months at the discretion of the Court or Judge, in default of payment of such fine."

It will be noticed that the penalty is called a fine.

Section 182 (as amended by 63 Vict. ch. 4, sec. 25) provides that a person voting more than once at the same election shall, for so doing, be imprisoned for six months, and shall be liable also to a penalty of *not more than \$200*.

Section 191 deals with offences respecting ballot papers and ballot boxes, and for those offending imprisonment only is provided.

The law under consideration is sub-sec. 2 of sec. 159. It deals only with persons guilty of bribery, in one form or another, as mentioned in sub-sec. 1 of that section. The material part of this sub-section as found in R.S.O. 1897, reads as follows: "Every person so offending shall incur a penalty of \$200." This was amended in 1900 (by 63 Vict. ch. 4, sec. 21), and now reads: "Every person so offending shall *on conviction* incur a penalty of \$200, and shall also be imprisoned for a term of six months with or without hard labour."

The amendment is most material, and unfortunately, as I think, sec. 195 was left untouched, and no further or other provision has been made for recovery of penalty, or punishment by imprisonment. Now a person guilty of bribery incurs the penalty only "on conviction," and "on conviction" he not only becomes liable for the pecuniary penalty of \$200, but he shall as an immediate punishment be imprisoned for six months. The plaintiff contends that sec. 195 gives him the right to sue for the money penalty, leaving it to this Court, or some other Court, in this or in some other proceeding, to direct imprisonment. The difficulty in dealing with this question is increased by the fact that sec. 195, which gives the right of action for penalties, is subject to the provisions of secs. 187 and 188.

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Section 187 constitutes any two Judges appointed for the trial of election petitions a Court for the trial of all corrupt practices, etc.; and sub-secs. 10 and 11 deal specially with the cases such as this, where there is provision for punishment in addition to the money penalty. The amendment seems to be so framed, whether that was the intention of the Legislature or not, as to bring sec. 159 into line with 160. That section deals with persons receiving money for voting and corrupt acts by voters in regard to their own votes; and persons so offending can be punished only by the Judges appointed for the trial of election petitions.

I must assume that each word in sub-sec. 2 of sec. 159 was carefully considered, and that this amendment was intended to change not only the punishment itself, by adding imprisonment to the pecuniary penalty, but also the way of dealing with offenders. They were to be dealt with either by the trial Judges or criminally. "Conviction," as here used, means more than mere adjudication or finding a charge proved in an action brought for recovery of the money penalty. Under and by virtue of sec. 187, a Court could have been constituted for the trial of this corrupt practice; sec. 169 provides that where a person is prosecuted before an Election Court for an offence under sec. 159, the Election Court may order such person to be prosecuted before some other Court to be named in the order. Under these circumstances, the accused might, if so ordered, be tried by a jury. If the accused is tried upon an indictment, he may be tried by a jury, but all trials under sec. 195 are to be by the Judge without a jury.

Section 167, which deals with "personation," was also amended as to making imprisonment compulsory, and the wording is, as to the offender, that he shall incur a penalty of \$400, and shall also, on conviction, be imprisoned for a term of one year. Is the peculiar wording of the amended sub-sec. 2 accidental, or is it intended to withhold from a common informer the power to bring an action merely to enforce part of the punishment for bribery by collecting the money penalty, or at least to hold back the right to sue until after a conviction in some quasi-criminal proceeding, or before Election Judges?

I come to the conclusion against the plaintiff's right to sue, and I do so with a good deal of hesitation. In a penal action the defendant is entitled to the benefit of any doubt. If my decision is correct, the result may be that bribery, the worst of election offences, may be more difficult to punish, so far as it is punishable by enforcing a pecuniary penalty, than some lesser corrupt practices. I regret that; and that fact has induced me to give a great deal of consideration to this case; but it is my duty to interpret, as best I can, the statute as it is. It is very difficult to reconcile with each other all the clauses of the Election Act. No doubt for many of the pecuniary penalties an action will lie. My decision is simply this, that no action will lie under sec. 195 for the pecuniary penalty attached to an offence created by sec. 159, sub-sec. 2, until after conviction.

In coming to the conclusion, I have carefully considered sec. 188, and I have noted that the word "convicted" is used in reference to the charge tried by trial Judges; and that rather confirms me than otherwise in the opinion formed. My view is, that, apart from proceedings before Election Trial Judges, there must be first *conviction*; then there follows money penalty and imprisonment. If sec. 195 applies as to recovery after conviction, the suit could then, if necessary, and subject to any statutory limitation, be brought. Even without sec. 195, after conviction an action would lie—grounded on the conviction—if the penalty was not otherwise enforced.

The second charge is made out, and what I said in the case of *Smith v. Carey* is applicable in this case. The defendant is liable for the penalty, but, for reasons given in the former case, I reduce the penalty to \$40.

Judgment for the plaintiff upon the second charge for \$40, with full costs of suit, to be paid by the defendant to the plaintiff within one month.

Judgment for the defendant as to the first charge, without costs. As, according to my view of the evidence, the charge was established in fact, there should be no set-off of costs. The plaintiff is entitled to the general costs of the action upon the second charge.

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[BOYD, C.]

Dec. 11.
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THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO

V.

THE TORONTO GENERAL TRUSTS CORPORATION.

Revenue—Succession Duty Act—Income Payable for Life or Years—When Duty Payable on Corpus.

A testator by his will devised his estate to a corporate trustee, upon trust to collect the income and apply it in their discretion for the benefit of his children and grandchildren for the period of twenty-one years after his death; and to pay over to the beneficiaries the whole income without accumulations, for the period between the end of the twenty-one years and the death of the last surviving child; when the corpus was to be divided:—

Held, that there was a plainly marked out period in the future, not sooner than twenty-one years, when the corpus of the estate was to be divided; with a prior interest for life or years according to the event in fact, during which the trustee standing *in loco parentis* was entitled to the present income of the property until the time arrived for the division of the corpus, and that the income only was presently liable to the payment of succession duty.

THIS was a special case stated for the opinion of the Court, which, after reciting the proof of the will of one Hugh Ryan and codicils, alleged:—

3. In the course of administration of the estate of the said Hugh Ryan a difference has arisen between the parties with regard to the succession duties payable to the Province of Ontario under the Act, R. S. O. 1897, ch. 24, and the time or times when the same are payable.

4. The plaintiff alleges that so much of the estate as is disposed of in the paragraphs of the said will numbered from 11 to 23 inclusive, is presently liable to the payment of such succession duties as provided in section 12 of the said Act.

5. The defendant alleges that the income only of so much of the said estate as is disposed of in the said paragraphs is presently liable to the payment of such succession duties, and that the succession duties in respect of the corpus thereof will not become payable until some future date or until the persons entitled to such corpus under the said disposition made by the said will shall have come into actual possession thereof.

The following are the clauses of the will in question:—

“11. During the period commencing with my death and ending twenty-one years after my death, one-fourth part of the

net income of my estate, after payment of the sum payable to my wife and of all expenses of my estate, and after payment of any annuities hereinafter given by this will, and after payment of any legacies that are expressly made payable out of income, shall be by my trustee set aside in the hands of the trustee, in respect of my son Patrick William Ryan and his children, if any born or to be born; another one-fourth of such net income shall be so set aside in respect of my son John Thomas Ryan and his children, if any born or to be born; another one-fourth shall be so set aside in respect of my daughter Mary Alice Smith and her children, born or to be born; and another one-fourth shall be so set aside in respect of my daughter Margaret Teresa Green and her children, if any born or to be born, but on the terms and conditions and for the purpose hereinafter mentioned in the case of each child, namely, for the period of twenty-one years after my death, the trustee may in the trustee's sole discretion apply the whole or any part or parts of the income so set apart in respect of any such child of mine from time to time, commencing at my death, and as and when the trustee deems fit, in or towards the support and maintenance or otherwise for the benefit of such child of mine, and of the child or children of such child born or to be born, or for any one or more of them in the discretion of the trustee, or partly for the use and benefit from time to time of the wife of any male child of mine, if the trustee so decide.

12. The trustee shall have full power to retain and withhold from any child or children or grandchildren or wife of any son of mine any of such income in the last preceding paragraph mentioned or referred to, and allow the same to accumulate till twenty-one years after my death or for any shorter time, and at or before the expiration of such time the trustee shall pay the said accumulations to any child or children of mine, and to the child or children of any child or children of mine, and to the wife of any son of mine, and partly to one and partly to another or others, and in such proportions to each or to any one or more of them as the trustee may decide.

13. If either of my sons should die leaving a widow, then my trustee may use and apply for the benefit of such widow

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during her widowhood a part of the income which could have gone to her husband if he lived, such part to be in the uncontrolled discretion of the trustee from time to time, and exercised whenever and as often as my trustee chooses.

14. If any son of mine should die without leaving a widow and also without leaving issue surviving him, then the amount of income to be set aside under paragraph number eleven in respect of my other living children or descendants of a deceased child shall be increased by the amount that would have been set aside for or in respect of the deceased one—for instance, if one of my said named sons die without issue and without leaving a widow, the amount to be set aside for or in respect of each child shall be one-third part instead of one-fourth part of the net income referred to in said paragraph eleven, and in the same way the proportionate amount to be set aside under said paragraph eleven shall be increased by the amount not used for the widow of any son of mine who may die leaving a widow but no child. The same consequences shall follow also in the case of a daughter of mine dying without leaving issue surviving her, namely, the amount of income to be set aside under paragraph eleven, in respect of my other surviving children or descendants of a deceased child shall be increased by the amount that would have been set aside for such deceased one, and shall then be one-third instead of one-fourth aforesaid, and if two die without issue the amount shall be one-half.

15. Any money payable or going to or for any minor under this my will may, if the trustee prefer at any time or times, be paid to the guardian of such minor, and my trustee shall not be liable to see to the application thereof.

16. Any moneys payable to my daughters or to any female under this my will shall be for the sole and separate use of such daughters or other females, free from any claim or control of any husband.

17. For greater certainty I declare that my express will and direction and intention is that any money intended for any child of mine or other person under paragraphs 11, 12 or 13 shall not vest in such child or other person until actually paid over, and such child or other person shall not have any right or interest or claim in or to any of the moneys aforesaid or be

entitled to demand same, and may not in any way sell, dispose of, mortgage, hypothecate, pledge or encumber the said moneys or any of them, or any claim they may make thereto.

18. On the marriage of any child of mine, the trustee may invest any part of the income intended for any of such children in the purchase of a farm or a dwelling house or of furniture and household effects, and of any and all of such, and give such child the free occupation and use thereof, the property however therein remaining in said trustee till twenty-one years after my death or until sooner, as my trustee may decide, if they so decide to sooner transfer the ownership in such farm, dwelling and personal property, or any of them, to such child.

19. Any income set aside under paragraph numbered 11 in respect of any child of mine, and not expended for or paid over to such child, or to his or her children, or to the wife of any son of mine, before the expiration of twenty-one years from my death shall then be paid to such child, or partly to such child of mine and partly to the child or children of such child of mine, or partly to the wife of any such child of mine, according to the discretion of my trustee and in such proportions as the trustee may decide, or the trustee may pay the same or any part to any one or more of my children or grandchildren whomsoever in such proportions as said trustee may think fit.

20. During the period (if any) commencing twenty-one years after my death and ending upon the death of the last surviving of my children, the net available income of my estate after providing for all expenses and annuities (if any) shall be distributed in the same manner as set forth in paragraph 11 of this my will, except that no accumulations shall be made; my intention being that the full amount of such net income shall be expended by my trustee upon the person or persons interested therein, or paid to them during the said period mentioned in this paragraph numbered 20.

21. On the death of any child of mine either in my lifetime or afterwards, leaving lawful issue, then the issue of such child shall, for all the purposes of paragraph eleven and except where these presents shew a contrary intention for all the purposes of my will, stand in the place of such child.

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22. Upon the death of the last surviving of my children or upon the expiration of twenty-one years from my death, whichever event shall last happen, the trustee of my estate shall distribute the capital of my estate in the manner following, namely, among the then surviving issue of any of my children who may have left issue, and the division shall be as follows: among my grandchildren who may be living, and the descendants of any deceased grandchild of mine, but in such a way that each grandchild shall have as much as any other grandchild, and the descendants of any deceased grandchild of mine shall have *per stirpes* the share that such deceased grandchild would have received if living at the time so fixed for distribution of said capital.

23. The division of my estate may be with or without realizing cash for the assets or any of them, and any part of the assets may be partitioned in such division if the trustee so decide."

The case was argued in Court on the 10th of December, 1902, before BOYD, C.

Shepley, K.C., for the Attorney-General. The case depends upon whether or not sub-sec. 2* of sec. 11 is applicable. If no person is entitled to the present enjoyment of the corpus of the estate or the income thereof, then the duty is payable on such corpus or income as provided in sec. 12, that is within eighteen months after the death of the deceased. Here the testator has expressly directed that none of the beneficiaries mentioned is to be entitled until he actually receives the money. While it may be said that in a general way the testator's intention was that the income should be applied for the benefit of the children and grandchildren, it is quite plain that during the twenty-one years, no member of that class may possibly receive any benefit whatever under the gift. Besides, under sec. 12, the duty is payable within the time specified, unless "otherwise herein

*Sec. 11, sub-sec. 2. Provided that where no person is entitled to the present enjoyment of such property or the income thereof, or where there is some part of such property or income to the present enjoyment of which no person is entitled, the duty on such property or income or such part of such property or income shall be payable as in section 12 is provided.

provided for." No express provision can be pointed to in the Act which takes the case arising under this will out of the comprehensive words of sec. 12.†

Foy, K. C., for the trustee. The annuities are vested in the trustee, and they are willing to pay duty now, as if the whole income were paid over, and later, on the corpus when those entitled in remainder come into possession. Where the corpus is divisible, parts may go to children and parts to grandchildren or others; the rates of duty may be different and values may then be changed. The estate should not pay; the tax is a succession duty, payable by the beneficiaries, by those who receive on the amount received: *Baily on Succession Duty in Canada*, pp. 2, 3, 5, 10, 11, 23, 25, 36 and 157.

E. F. B. Johnston, K. C., for the beneficiaries. The Act must settle the duty, the will cannot. The will determines the conditions, and the question of duty must then be determined by the Act. The only question under the will is, did the children take an interest in the estate? They only have an interest in the income, and should not pay the duty on the

† 12 (1) The duties imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the deceased, or within eighteen months thereafter, and if the same are paid within eighteen months no interest shall be charged or collected thereon, but if not so paid interest at the rate of six per cent. per annum from the death of the deceased shall be charged and collected, and such duties together with the interest thereon shall be and remain a lien upon the property in respect to which they are payable until the same is paid.

(2) The treasurer of the Province on being satisfied that the full amount of succession duty has been or will be paid in respect of an estate or any part thereof, shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for succession duty the property shewn by a certificate to form the estate, or such part thereof, as the case may be.

(3) Such certificate shall not discharge any person or property from succession duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shewn to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value thereof were added to the value of the property, in respect of which duty has been already accounted for.

(4) Provided, however, that a certificate purporting to be a discharge of the whole succession duty payable in respect of any property included in the certificate shall exonerate from the duty a *bonâ fide* purchaser for valuable consideration without notice, notwithstanding any such fraud or failure.

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corpus. They should not pay in an event which has not happened. Sub-sec. 2 of sec. 11 does not apply to income, but to "property," which the children may never come into possession of, although those entitled in remainder will. They are not even sure of enjoying the whole income, it may be only a part, in the trustee's discretion.

Shepley, in reply. The statute is based upon what testators have done with their property and how they have dealt with it.

December 11. BOYD, C.:—The estate is vested in the corporate trustee (also appointed executor) upon trust to collect the income and apply the whole net income for the benefit of the children and children's children for twenty-one years after the death. At that time, or upon the death of the last surviving child of the testator, the capital of the estate is to be divided among the specified members or descendants of the testator's family.

For the first twenty-one years after death the trustee has a discretion as to the distribution or accumulation of the income, which is to be divided into fourths: one-fourth being intended for the benefit of each of the four children of the testator; after the end of the twenty-one years, and before the death of the last surviving child, distribution is to be made without accumulation of the entire net income among all the beneficiaries. The children and their families are absolutely entitled to the beneficial use of all the income during this possible period beginning twenty-one years after testator's death and the death of his last surviving child.

During the twenty-one years the children are not absolutely entitled to the whole from year to year, but the frame of the will is that the trustee is *in loco parentis*, and shall exercise a discretion to have each and all supported and maintained with as large an allowance as will be in the best sense beneficial and advantageous to them; and further, that if the whole income is not expended in its four-fold division, that the accumulations shall at the end of the twenty-one years or sooner be paid to such of the family group who have been maintained as the trustee may decide.

Thus it appears that there is plainly marked out a period in the future, not sooner than twenty-one years, when the corpus of the estate is to be divided; and till then the income of the estate is to be applied yearly for the maintenance and benefit of the children, and if not all be so applied, it is to be accumulated for the benefit of the children at the end of the twenty-one years.

The scheme of the Succession Duties Act is to provide for a duty on succession to property by persons succeeding to estates or interest in property by testate or intestate title.

The Act provides for the present payment of the duty upon the present possession or enjoyment of the estate; in the case of future estates the duty is not to be levied until the person shall come into the actual possession by the determination of the prior estate for life or years: R. S. O. 1897, ch. 24, sec. 11 (1).

There is a prior interest here for life or years (according to the event in fact), in which we find that the trustee (standing *in loco parentis*) is entitled to the present income of the property, and is to be so entitled till the time arrives when the corpus is to be divided. True, the trustee is not entitled to the beneficial enjoyment of this income, but the Act does not use the word "beneficial," though that is found in the new section substituted for sec. 11 (2): see 1 Edw. VII., ch. 8, sec. 8 (3) (O.).

Yet the trustee collects and holds for the enjoyment and support of the beneficiaries, and the whole of each year's income may be so expended, or if not, it will ultimately be so expended during or at the end of the twenty-one years.

This estate of testamentary disposition satisfies the meaning of the statute: that where there is present enjoyment there should be present payment of the duties based upon the estate or interest which is enjoyed. In this case that is the prior estate for years or the life of the longest lived of the children, and after which comes the future estate in fee, not now, to be levied upon for duty.

For these reasons, I answer the stated case in conformity with the contention set forth on behalf of the defendants.

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[FALCONBRIDGE, C.J.K.B.]

1902

HAY V. BINGHAM.

Dec. 22.

Defamation—Libel—Pleading Setting out whole Article—Immaterial Issue—Embarrassing—Striking out.

The very words complained of in an action of defamation must be set out by the plaintiff, in order that the Court may judge whether they constitute a cause of action—it is not sufficient to give the substance or purport with innuendoes—it is sufficient to set out the libellous passages, provided that nothing be omitted which qualifies or alters the sense, and as the libel itself must be produced at the trial, and the defendant is entitled to have the whole of it read :—

Held, that the plaintiff was entitled in this action to set out in the statement of claim the whole article complained of. But

Held, also, that certain words in another paragraph which tendered an issue not material but which might be embarrassing should be struck out.

Deyo v. Brundage (1856), 13 Howard P.R. (S.C.N.Y.) 221, specially referred to.

THIS was an appeal from an order of the local Master at Ottawa striking out paragraph four and part of paragraph five in the statement of claim in an action for libel.

The statement of claim set out that the plaintiff was a prominent and active politician, identified with the Conservative party, and an active worker on behalf of that party: that the defendant was a candidate in the Liberal interest for the Legislature of the Province of Ontario at a general election: that the plaintiff supported the Conservative candidate and opposed the defendant: and that the defendant was defeated, and on the day following the election he falsely and maliciously caused to be printed and published in the form of an interview in a newspaper . . . of and concerning the plaintiff the words following :—

“*Mr. Bingham on the result.*”

“Liberal leaders discuss the cause of Ottawa’s verdict. Mr. Bingham was around this morning looking as happy as ever. ‘The facts are,’ he said, ‘I was never extremely anxious that I should be elected.’” The article was then set out *verbatim*, the first part stating the manner in which he had conducted the campaign, his sympathy for another defeated candidate, and approbation of his conduct while in the Legislature before, etc.; it then proceeded: “I wish to refer to one or

two incidents of the campaign," and set out a \$2,000 stock incident with the Conservative candidate; then proceeding: "Mr. R. G. Hay was another who came to me after it was known that I was a candidate. He wished me to endorse a note for him for \$1,000 to start an establishment on Bank street. I said to him that I would consider the matter, and remarked, 'Won't you be lonesome out of politics?' I afterwards declined to accede to his request, and he later on accused me of breach of loyalty, etc., on the occasion of the jubilee of our late beloved Queen." Other instances were then given with particulars; such as becoming security for another \$1,000; closing a hotel after a municipal election; preventing poor people from collecting driftwood; then a statement that he fought a straightforward campaign; rumours of efforts to buy up certain Reform committees; and charges circulated in a newspaper.

The statement of claim then proceeded: "5. The defendant meant thereby to imply that his defeat had been due not to any want of merit in himself or his policy or his party, but to his refusal to resort to bribery and corrupt methods; that the plaintiff and others had offered him their services and support in consideration of a bribe; that the plaintiff had corruptly offered to desert his party and abandon his principles, and give the defendant his services and support at the said election in consideration of the defendant endorsing his promissory note for \$1,000 to enable him to start in business; that if the defendant had acceded to the plaintiff's said alleged request and had endorsed the plaintiff's promissory note for \$1,000, as aforesaid, he would have had the plaintiff's services and support at the said election; that the plaintiff's support of the Conservative candidates and opposition to the defendant's candidature at the said election were due not to principle and party loyalty, but to the defendant's alleged refusal to endorse the plaintiff's promissory note for \$1,000 as aforesaid, and that because of the defendant's said alleged refusal to endorse the plaintiff's promissory note for \$1,000 as aforesaid, the plaintiff not only opposed his candidature at the said election, but attacked him personally, and openly accused him of disloyalty, etc."

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The defendant moved to strike out the fourth paragraph of the statement of claim as embarrassing, on the ground that it contained statements of fact irrelevant, immaterial and prolix; and parts of paragraph five on the ground that it contained statements of more than one alleged fact, and that some of the facts disclosed no cause of action. The motion was argued on the 2nd of December, 1902, before the local Master at Ottawa.

The Master made an order striking out paragraph four, and from paragraph five the following words: "The defendant meant thereby to imply that his defeat had been due not to any want of merit in himself or his policy but to his refusal to resort to bribery and corrupt methods."

From this order the plaintiff appealed, and the appeal was argued at the Weekly sittings of the Court at Ottawa on the 13th of December, 1902, before FALCONBRIDGE, C.J.K.B.

Taylor McVeity, for the appeal.

Glyn Osler, contra.

It was contended that as the plaintiff was entitled to give the whole article in evidence, he was entitled to set it all out in the pleadings, and the following cases were cited: *Millington v. Loring* (1880), 6 Q.B.D. 190; *Whitney v. Moignard* (1890), 24 Q.B.D. 630; *Deyo v. Brundage* (1856), 13 Howard P.R. (N.Y.S.C.) 221.

December 22. FALCONBRIDGE, C.J.:—Rules 268 and 275 have no relation whatever to the setting out of the matter complained of in an action of defamation, because in that form of action the very words complained of must be set out by plaintiff "in order that the Court may judge whether they constitute a cause of action:" *Wright v. Clements* (1820), 3 B. & Ald. 503, at p. 506.

It is not sufficient to give the substance or purport of the libel or slander with innuendoes: *Odgers Law of Libel*, 3rd ed., p. 553; the words must be set out *verbatim*.

Generally speaking, it is not necessary to set out the whole of an article containing libellous passages. "It is sufficient to set out the libellous passages only, provided that nothing be

omitted which qualifies or alters the same:" Odgers, p. 554 and cases cited.

The libel itself must be produced at the trial, and the defendant is entitled to have the whole of it read.

But in this appeal, for the first time in my experience, a defendant objects to the whole of it being set out in the statement of claim.

I fail entirely to see how the pleading offends against Rule 298, how it is scandalous, or how it can be said to prejudice, embarrass or delay the fair trial of the action.

Defendant either published it or he did not. If he did not, *cadit questio*. If he did, how can he object to his whole publication being pleaded and put in?

I do not find direct authority in our own courts. The Supreme Court of New York decided in *Deyo v. Brundage*, 13 Howard P.R. 221, that plaintiff need not select out from the whole conversation those expressions only, which involve the slanderous charge; but may allege all that was said at the time, that when proved, the jury may be able to determine what was intended.

I refer also to *Millington v. Loring*, 6 Q. B. D. 190, at p. 194, and *Whitney v. Moignard*, 24 Q. B. D. 630.

The portion of the fifth paragraph struck out by the learned Master was properly struck out. It was not fairly pleaded as innuendo. It does not refer to the plaintiff. It suggests a more or less innocuous glorification of defendant by himself. It tenders an issue which is not material, and which may be embarrassing.

The appeal will be allowed as to the fourth paragraph, and disallowed as to the fifth paragraph.

Costs of this appeal to be costs in the cause to the successful party.

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[STREET, J.]

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KING V. MATTHEWS ET AL.

Jan. 8.

Municipal Corporations—Local Improvements—Reconstruction of Sidewalk—Payment for out of General Funds—Illegality—Liability of Councillors Sanctioning Payment—Trustees—Breach of Trust—Excuse—Relieving Statute.

By a special Act of the Legislature of Ontario incorporating a town it was provided that all expenditure in the municipality for improvements and services for which special provisions were made in secs. 612 and 624 of the Consolidated Municipal Act, 1883, should be by special assessment on the property benefited and not exempt by law from taxation; and the construction of sidewalks upon the local improvement plan was one of the matters provided for by sec. 612.

In 1886 a board sidewalk was laid upon one of the streets of the town, in accordance with a by-law, and paid for by a special assessment upon the properties fronting upon it. A portion of the sidewalk so laid was not much used, and had never been repaired, and in 1902 was out of repair and dangerous. The remainder had been more used, had been repaired from time to time by the council at the general expense, and in 1902 was in a good state of repair. In that year the agent of the owners of the property fronting on the part of the sidewalk that was out of repair threatened proceedings to compel the council to put it in repair, and, as there was pressing need that it should be put into a state in which it would not be dangerous to the public, the chairman of the board of works directed the corporation foreman to proceed at once to put it in a good state of repair, and this was done by taking up the old sidewalk altogether, laying down new stringers, using such of the boards of the old sidewalk as were good, and replacing those which were bad with new ones. This work was paid for out of the general funds of the town.

In an action by a ratepayer, on behalf of all ratepayers other than the defendants, against the members of the council who sanctioned the payment for this improvement, and against the corporation of the town, the claim was that the individual defendants might be ordered to pay to the corporation the moneys expended in the construction of the sidewalk, and that the defendants might be enjoined from paying any further moneys in respect thereof:—

Held, that the members of the council who were sued, having acted in good faith and under the *bond fide* belief that they were doing their duty as trustees for the body of ratepayers in paying out of the general funds of the municipality for what was practically a new sidewalk, even if they had misconstrued the meaning of the statutes, which was by no means clear, at all events acted honestly and reasonably, and were entitled to be excused for the alleged breach of trust.

Seemle, that 62 Vict. (2) ch. 15, sec. 1 (O.), applied to these defendants; but, if it did not, they should not be more hardly dealt with than ordinary trustees, and should be treated as within its equity.

THIS was an action by a ratepayer of the town of Port Arthur, on behalf of all the ratepayers but the defendants, against certain members of the municipal council of the town, and the corporation of the town of Port Arthur, to restrain the expenditure of moneys of the corporation upon the building of a certain sidewalk in the town.

The action was tried at Port Arthur on the 15th December, 1902, before STREET, J., without a jury.

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H. L. Drayton and *D. Mills*, for the plaintiff.

N. W. Rowell, K.C., and *W. F. Langworthy*, for the defendants.

January 8. STREET, J.:—The town of Port Arthur was incorporated by the special Act of the Province of Ontario 47 Vict. ch. 57, and by sec. 5 of that Act it is provided as follows: "All expenditure in the municipality for the improvements and services, or for any class or classes of improvement or service for which special provisions are made in sections 612 and 624 of 'The Consolidated Municipal Act, 1883,' shall be by special assessment on the property benefited and not exempt by law from assessment." The construction of sidewalks upon the local improvement plan is one of the matters provided for by sec. 612 of the Act here referred to.

In the autumn of the year 1886 the council of the town of Port Arthur passed a by-law for the construction of board sidewalks upon certain streets in the town by special assessment upon the properties in front of which they were to be built, and in accordance with this by-law a walk of 2,051 feet in length was built upon Cumberland street, about one-half of it being in front of a property called the McVicker estate, the owner of which was assessed and paid some \$2,000 for its share of the improvement. The town at the same time built a number of other sidewalks of the same kind, some of which have since been replaced and some of which are still in use. The portion of the sidewalk in front of the McVicker estate was not much used until the last year or two, and no repairs were ever done to it, with the result that it had become out of repair and dangerous; the remainder of the sidewalk on Cumberland street, having been more used by the public, had been repaired from time to time by the council at the general expense, and is still in a good state of repair.

On the 11th July, 1902, Mr. Ruttan, the agent in charge of the McVicker estate, wrote to the council of the town informing them that the sidewalk in front of the estate was in a

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dangerous state and much out of repair, asserting that it was the duty of the council to keep it in repair, and requiring them to do so. Thereupon the mayor and the chairman of the board of works inspected the sidewalk and proposed to Mr. Ruttan to take up the board sidewalk altogether and lay down gravel there; but this proposal was rejected by him as not being what he was entitled to; he asserted the statutory duty of the council to keep the board sidewalk in repair, and threatened proceedings to compel them to do what he asserted was their duty. As there was pressing need that the sidewalk should be put into a state in which it would not be dangerous to the public, the chairman of the board of works thereupon directed the corporation foreman to proceed at once to put it in a good state of repair, and this was done by taking up the old sidewalk altogether, laying down stringers of railway ties in place of the existing stringers which had decayed, using such of the boards of the old sidewalk as were good and replacing those which were bad with new ones. The result was an entirely new foundation, and a new superstructure to the extent of 585 feet out of a total length of 1068 feet, the remaining 483 feet of the superstructure being constructed with the old boards. The total cost was between \$300 and \$350, including material and labour. The plaintiff had been, in the preceding year, the chairman of the board of works, but was not in the council in 1902. He was called as a witness and stated that on the 11th July he saw the work begun and told Mr. Cooke, a member of the council, and one of the defendants, that it was wrong to do it out of public money. He saw the work proceeding daily, but took no further steps until 11th August, when he caused his solicitor to write to the mayor and council protesting against the cost of this sidewalk being paid for by general taxation. At this time the work was practically completed, although the plaintiff says that a day's, or perhaps a day and half's, work was done upon it after his letter was written. The accounts afterwards came before the council and were paid.

The present action was brought on the 16th August, 1902, by the plaintiff on behalf of himself and all other ratepayers of the town except the defendants, against the members of the council who sanctioned the payment for this improvement and

against the corporation of the town, praying that the defendants, other than the corporation, might be ordered to pay to the corporation the moneys expended in the construction of the sidewalk, and for an injunction to prevent the payment of any further moneys in respect thereof.

It was admitted by the defendants that the moneys paid for the construction of the sidewalk had been paid out of the general funds of the town, and not out of any special appropriation for the purpose. The defendants set up that it was their duty under the statute to keep the sidewalk in good repair at the general expense of the municipality, and that the work done was treated as mere repair, and was only rendered unusually extensive by reason of the neglect of former councils of their duty to keep it in repair, and that they acted in good faith in the matter.

Mr. Ruttan, in demanding of the council that they should make up for their neglect of this sidewalk in past years by putting it in repair now, even though the repairs should be so extensive as almost to amount to reconstruction, relied upon the 3rd sub-section of the 612th section of the Consolidated Municipal Act of 1883, which has been continued in the various revisions of the Municipal Act, and is still law,* and which provides that "all works constructed under the said preceding sub-sections shall thereafter be kept in a good and sufficient state of repair at the expense of the township, city, town, or village generally." He was able to point to the other half of the same sidewalk which had been constructed at the same time and was still in good repair because the council had not neglected its duty to keep it from time to time in repair. The council, in remedying, by the construction of what was practically almost a new work under the name of the repair of an old one, the neglect of former councils to repair, had the high authority of the opinion of the Chief Justice of the Common Pleas in *Re Medland and City of Toronto* (1899), 31 O.R. 243, at p. 251, for the belief that what they were doing was nothing more than what they could be compelled by Mr. Ruttan to do, under sec. 41 of ch. 26, 62 Vict. (2) Ontario statutes of 1899.

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* See R.S.O. 1897, ch. 223, sec. 666.

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I think it is clear that the members of the council acted in perfect good faith in the matter, and were under the *bonâ fide* belief that they were doing their duty as trustees for the general body of ratepayers. The authorities, even before the late Acts respecting the liability of trustees, shew the disinclination of the Courts to hold municipal officers who have acted in good faith personally liable for mere mistakes: *Baxter v. Kerr* (1876), 23 Gr. 367.

Chapter 15 of 62 Vict. (2), sec. 1, however, seems wide enough to apply to the position occupied by these defendants, who are charged with a breach of their trust as members of the council in dealing with the funds of the municipality. Even if not within the strict letter of the Act, they should not be more hardly dealt with than trustees who are, and should be treated as within its equity. I think, under the circumstances, that, even if they misconstrued the meaning of the statutes bearing upon the subject, which is by no means clear, they at all events acted honestly and reasonably, and are entitled to be excused for the alleged breach of trust.

I think the action should be dismissed with costs.

E. B. B.

[IN CHAMBERS.]

CAMPBELL v. SCOTT.

1903

Feb. 17.

*Discovery—Examination of Party for—Attendance Before Special Examiner—
Duty to Remain Until Examined.*

A party to an action subpoenaed for examination for discovery before a special examiner and who has been paid his conduct money for the day may be "compelled to attend and testify in the same manner . . . as a witness." One of four defendants, all of whom were subpoenaed for half past ten in the morning and attended, after being excluded from the examiner's chambers waited while the others were being separately examined until after two in the afternoon when, without communicating with the examiner, he went away and did not attend for examination :—

Held, that he was rightly ordered to attend again for examination.

APPEAL from an order of a local Judge ordering a defendant to attend a second time for examination for discovery before a special examiner.

The facts are stated in the judgment.

The appeal was argued in Chambers on the 16th February, 1903, before MEREDITH, J.

J. P. Mabee, K.C., for the appeal.

J. H. Moss, contra.

February 17. MEREDITH, J.:—The one excuse offered for the defendant's failure to attend and submit to examination is, that he was subpoenaed to attend at 10.30 a.m., and was not called for examination until about 2.30 p.m.

It appears that the four defendants were to be examined for discovery on the same day; that they were all subpoenaed to attend at 10.30 a.m.; and did attend; and, soon after, all four were sworn by the examiner, and three of them excluded while the fourth was being examined. No objection was made, no inconvenience suggested, nor was any request for any different mode of procedure made.

Between two and three o'clock in the afternoon, two of the defendants having been examined, the third being under examination, and the fourth, this defendant, still waiting to be examined, objection was made by counsel for the defendants to

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the presence of one Peter Campbell at the examination, and the examiner refusing to exclude him, the same counsel refused to proceed further in it, and he and the defendant under examination left the room, and, being joined by this defendant, all left the court house.

The examiner's certificate is, that "the defendants Moris Stabler and Douglas H. MacTavish, with their counsel, left the examination room and departed from my office and did not attend further to be examined for discovery herein."

The facts, therefore, do not support the excuse: this defendant's real reason for not submitting to examination was because his counsel and co-defendant withdrew from the proceedings owing to the examiner's adverse ruling. That ruling is not now called in question.

But if that were not so, the excuse would not avail.

This defendant was duly subpoenaed and paid his conduct money for the day, and, under the rule (439), he might be "compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination, as a witness," except as in the rules is otherwise provided.

An examiner ought to have regard, to some extent, to the convenience of the party examined, and ought not to needlessly put to inconvenience or loss anyone under examination, or to be examined: but no question of that sort arose in this case.

The local Judge's order, requiring this defendant to attend again for examination, was right. This appeal is dismissed with costs.

G. A. B.

[IN CHAMBERS.]

LOVELL V. PHILLIPS.

1903

Feb. 9.

Costs—Lower Scale—Amount claimed reduced by Trial Judge—Set-off.

In an action in the High Court for \$340 the balance of a \$970 account for logs, \$450 of which was paid before action, the trial Judge found the sale was made as contended by the plaintiff but reduced the amount by \$20 for some logs not received by defendant:—

Held, that the plaintiff was only entitled to county court costs and the defendant was entitled to a set-off.

Brown v. Hose (1890), 14 P.R. 3, distinguished.

APPEAL by plaintiff from a certificate of a taxing officer. The facts are stated in the judgment.

The appeal was argued in Chambers on the 2nd of February, 1903, before BRITTON, J.

S. B. Woods, for the appeal. The plaintiff did not succeed in recovering the amount he claimed by reason of the deduction made by the trial Judge, but only on a *quantum meruit*, so the county court had no jurisdiction, as the amount was not liquidated or ascertained under sub-section 2 of section 23 of ch. 55 of R. S. O. 1897, the County Courts Act: *Ostrom v. Benjamin* (No. 2) (1894), 21 A.R. 467, *per* MacLennan, J.A., at p. 471; *Re McKay v. Martin* (1890), 21 O.R. 104; *Brown v. Hose* (1890), 14 P.R. 3; *Robb v. Murray* (1889), 16 A.R. 503. An unadmitted set-off can not be allowed to reduce the plaintiff's claim into the jurisdiction of the county court: *Furnival v. Saunders* (1866), 26 U.C.R. 119; *Hubbard v. Goodley* (1890), 25 Q.B.D. 156.

H. D. Gamble, contra. The plaintiff did not succeed upon a *quantum meruit* but upon the contract set out in the statement of claim; the amount was thus ascertained by the act of the parties and credit being given for \$450, brought the claim within the jurisdiction of the county court. The trial Judge found some of the logs had not been delivered and deducted \$20 from the plaintiff's claim. *Robb v. Murray* is overruled by *Ostrom v. Benjamin* (No. 2). *Furnival v. Saunders* is clearly distinguishable. *Thompson v. Pearson* (1899), 18 P.R. 420, is

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in point and settles the practice against the plaintiff. See also *Fleming v. Livingstone* (1873), 6 P.R. 63, *McMurtry v. Munro* (1856), 14 U.C.R. 166, and *Bennett v. White* (1889), 13 P.R. 149, *per* Ferguson, J., at pp. 151, 152.

February 9. BRITTON, J.:—This action was brought to recover \$340, balance of an account for \$790 for logs sold by the plaintiff to the defendant. The sum of \$450 was paid by the defendant before action.

The trial Judge found that the sale was made as contended by the plaintiff, but reduced the amount by \$20 by reason of some of the logs not having been received by the defendant.

Upon this judgment, with no certificate, the taxing officer taxed to the plaintiff costs on only the lower scale, and allowed the defendant a set-off. From such taxation the plaintiff now appeals.

The plaintiff concedes that if the finding had been for \$340, as claimed, he would have been entitled only to costs on the county court scale, but it is contended that as the trial Judge reduced the amount, no matter why, the finding was for an amount not liquidated or ascertained by the signature of the defendant or by act of the parties, and, therefore, that the action was not within the jurisdiction of the county court.

If the \$340 was an amount so liquidated or ascertained as to entitle the plaintiff to sue in the county court, the reduction, whether by reason of set-off or the failure of the defendant to get all the logs from any cause which would entitle him to set up a counterclaim, ought not to result in compelling the defendant to lose the benefit of such reduction by being forced to pay costs on the higher scale.

Furnival v. Saunders, 26 U.C.R. 119, is a case in which the original amount was not reduced by payment but by set-off, which set-off was not agreed to be taken as payment. That was the converse of the present case, and was not decided upon the mere question of costs. The plaintiff brought his action in the county court, and the defendant raised the question of jurisdiction.

Ostrom v. Benjamin (No. 2), 21 A.R. 467, is in favour of the defendant's contention. In that case, which overrules

Robb v. Murray, 16 A. R. 503, it is decided that when a sum up to the limit of the jurisdiction of the county court is agreed upon, denial on the pleadings of the contract and of the price does not avail to oust the Court of jurisdiction.

If *Robb v. Murray* is overruled, *Re McKay v. Martin*, 21 O.R. 104, need not be considered.

Brown v. Hose, 14 P. R. 3, comes nearer to supporting the plaintiff's contention than any other case cited. It is held there that only the pleadings must be looked at in order to ascertain the amount in dispute. There the defendant admitted that part of the cause of action was certain, but denied that the balance was liquidated or ascertained, and nothing was disclosed at the trial to shew that the defendant's contention, as to that part, was not correct.

This case can be distinguished from *Brown v. Hose*. Here there is an express finding that the amount was liquidated or ascertained. The amount was reduced, by payment, to \$340, an amount clearly within the jurisdiction of the county court. There appears at the trial a reason why the plaintiff should not recover the whole of this balance, but only \$320. It surely can not be that the amount sued for must not be reduced, even by a cent, without, as a consequence, stopping the case if in the county court, and compelling its transfer to the High Court, or, if in the High Court, allowing plaintiff to get High Court costs.

Suppose that an action is brought in the division court upon a promissory note for \$190, given for money lent, and the claim is disputed, but at the trial the making of the note is admitted or proved, and then the defendant says: "But you did not give me the whole of the money; you only gave me \$180;" and the plaintiff admits that, or the Judge so finds, is it possible that the plaintiff cannot get judgment in that action, in that Court, for the reduced amount?

It seems to me only common sense that the defendant should not be punished by reason of the reduction of an amount already within the jurisdiction of the county court.

Upon the whole case, I think the plaintiff should not pay costs of this appeal.

Appeal dismissed without costs.

Britton, J.

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[STREET, J.]

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SMITH V. HUGHES ET AL.

Jan. 8.

Specific Performance—Sale of Land—Contract by Agent of Purchaser—Action by Agent—Delay of Purchaser—Resale by Purchaser—Right of Sub-purchaser to Join Vendor as Party.

Where an agent makes a contract for the purchase of land in his own name, the vendor knowing that the agent is acting for another person, whose name is not disclosed, the agent cannot maintain an action in his own name against the vendor for specific performance of the contract.

Where the value of land is uncertain and speculative, the purchaser thereof must act upon his rights with reasonable diligence and promptitude upon pain of losing them.

The owner of land of that character on the 1st May, 1900, contracted to sell it to H., but was never paid anything upon the purchase money, although \$50 was to be paid down, and \$200 in six months, to be secured by H.'s note, which never was given. On the 29th August, 1900, H. contracted to sell the land to the plaintiff acting for an unnamed principal, and the owner was willing to carry out the resale. In September and October, 1900, there was some correspondence about the title, but after that until the 3rd April, 1901, the plaintiff's principal did nothing. On that day he sent the owner a conveyance of the land for execution, but the owner tore it up and said that owing to the delay he would not carry out the contract. On the 9th April, 1901, the plaintiff's principal brought this action, in the name of the plaintiff, for specific performance of the contract for resale, against H. alone, but took no other steps until the 24th October, 1901, when he obtained an order adding the owner as a defendant, and then served the writ on both defendants. There was such further delay in the prosecution of the action that it was not tried till December, 1902:—

Held, that the whole course of proceedings on the part of the plaintiff's principal shewed that he had been endeavouring to keep alive his claim to the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy it, in case it should depreciate; and the action should be dismissed as against both defendants.

Held, that the owner was properly joined as a defendant; the foundation of the right against him being that the plaintiff, or his principal, was the equitable owner under his contract with H. of H.'s rights against the owner of the land, and might join the latter upon offering to perform H.'s contract.

ACTION by the plaintiff, alleging himself to be the purchaser from the defendant Hughes of certain lands in the town of Sault Ste. Marie, and claiming specific performance of the contract as against Hughes, and also as against the defendant Plummer, who had contracted to sell the same lands to Hughes.

The defendants denied any contract by the defendant Hughes to sell to the plaintiff; the defendant Plummer denied any contract to sell to Hughes, and set up in the alternative that if any such contract had been entered into by him it had been cancelled by mutual consent: and both defendants set up

the Statute of Frauds: and that the plaintiff's rights, if any, had been barred by his delay.

The action was tried before STREET, J., without a jury, at Sault Ste. Marie, on the 22nd December, 1902.

The plaintiff at the trial put in and proved the execution by the defendant Hughes of a contract under seal in the following words:—

“Sault Ste. Marie, Ont., Aug. 29, 1900. In consideration of \$50, receipt of which is hereby acknowledged, I agree to sell to C. N. Smith for the sum of \$1,500, \$450 in cash on or before the expiration of 21 days from date, and the balance of \$1,000 to be secured by his assuming the mortgage at present upon the property, the following property, that is to say, the property now occupied by me as a brickyard and containing three acres more or less and better known as a part of the E. B. Borron sub-division, together with all machinery, appliances, etc., thereon used for the manufacture of brick. F. H. Hughes.” (Seal.)

The defendant Hughes was called as a witness and said that at his first interview with the plaintiff before this contract was signed the plaintiff told him that he was not buying for himself but for a third person, whose name was not disclosed at the time, and who was advancing the \$50 paid down: that it was immaterial to him to whom he sold, whether to the plaintiff or to a third person, and so he signed the contract. On the day after the payment of the \$50 and the execution of the contract, the plaintiff again went to the defendant Hughes and told him that, as he was not buying for himself but for a third person, who was not paying him any commission, it would not be worth his while to proceed further with the matter unless Hughes would pay him for doing so, and thereupon Hughes signed a writing as follows: “Sault Ste. Marie, Aug. 30, 1900. I hereby agree to pay C. N. Smith the sum of \$50 commission for negotiating the sale of my brickyard property: the amount to be paid to him when the transfer of the property is made. F. H. Hughes.”

On the 1st May, 1900, a bargain had been made between the defendant Hughes and the defendant Plummer for the sale

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by Plummer to Hughes of the land in question, described as being a parcel of land called the E. B. Borron block in the town of Sault Ste. Marie, together with certain machinery and plant thereon, which had theretofore been used in connection with the brickyard situated on the premises; the purchase money to be \$1,250, payable as follows: \$50 down; \$200 in six months without interest; and the balance by the purchaser assuming and agreeing to pay \$1,000 of a mortgage upon the property, together with interest on the said sum of \$1,000 from the date of the bargain.

The terms of this bargain were reduced to writing and agreed to by both parties, but by oversight the writing was never signed by either of them. The defendant Hughes, however, was let into possession under the contract, and was in possession at the time of the contract with the plaintiff, but he left the possession shortly afterwards, leaving the plant and machinery on the premises. Only a portion of the property was used as a brickyard, and it was fenced only partially upon one side, the other side being open and not in any way marked off from adjoining land; the other two sides were bounded by streets. The contract contained a provision that time should be of the essence of the contract. The \$50 to be paid down was never paid, nor was any other money paid upon it by Hughes. A mortgage was produced from the defendant Plummer and others to one Johnson, describing by metes and bounds the lands which Plummer had contracted to sell to Hughes, and it was proved that this was the only mortgage covering the brickyard, and that the lands described in it contained about three acres and were part of the E. B. Borron subdivision, and were the lands described in the statement of claim. The plaintiff Smith was called as a witness and stated that he had no interest in the present action and had given no instructions for it, although he adopted it as his action; that he had acted throughout the matter as agent only for Mr. Hamilton, a lawyer practising at Sault Ste. Marie, who had furnished the \$50 which he paid to Hughes, and who was conducting the litigation.

Hamilton, having investigated the title to the property, spoke to Hughes about some defects in the title to it and wrote

him on the 21st September, 1900, that he was prepared to carry out the purchase upon the title being cleared up. On the 24th September, 1900, he again wrote to Hughes saying that "the purchaser" was prepared to carry out the contract on some named objections to title being removed. Hughes referred him to Plummer with regard to a claim which one Kitson appeared to have upon it, and Hamilton then wrote Plummer about it, who on 28th September, 1901, wrote Hamilton explaining his title as it stood and saying that was all the title he could give. Plummer had been made aware by Hughes of his proposed sale to Smith before the contract of 29th August, 1900, was signed, and had given his consent to his selling. Nothing was done towards correcting the defects in the title; a deed was sent to Plummer for execution on 3rd April, 1901, by Mr. Elliott, the plaintiff's solicitor, but Plummer tore up the deed, and replied that owing to the long delay he would not carry out his contract. On 9th April, 1901, the present action was brought in the name of Smith alone against Hughes alone, asking for specific performance of the contract with him. Nothing further was done until the 24th October, 1901, when an order was made adding Plummer as a co-defendant, and the statement of claim was delivered on the 5th November, 1901, and statements of defence by both defendants were filed on the 18th November, 1901. The action was entered for trial at the Summer Assizes in 1902, but was not reached: it was not brought on at the special sittings in November, 1902, but was finally tried at the winter assizes on the 22nd December, 1902.

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A. B. Aylesworth, K.C., and *J. E. Irving*, for the plaintiff.
M. McFadden, for the defendant Hughes.

W. R. Riddell, K.C., and *P. T. Rowland*, for the defendant Plummer.

January 8. STREET, J.:—It appears that Hamilton gave Smith the \$50 which Smith paid to Hughes on the 29th August, 1900, for the option given by Hughes to Smith to purchase the property. Hughes knew that Smith was acting for a third party, but not the name of the third party.

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This seems to have been Smith's only connection with the matter as agent for Hamilton; the next day he went back to Hughes, and obtained a promise in writing to pay him a commission of \$50, if he succeeded in obtaining the completion of the purchase by his original principal. There was nothing in the second of these transactions which could alter the rights acquired by Smith's principal, Hamilton, under the option he had obtained the day before; but Smith's real position as a mere agent having no personal interest in the matter beyond his commission is emphasized by it. He became indeed on the 30th August, 1900, the agent of the defendant to procure Hamilton to accept the option and carry out the purchase. It seems clear upon the authorities that an action for specific performance cannot, under the circumstances, be maintained by a mere agent in his own name without in some way bringing in his principal, who is the only person having any beneficial interest in the action. This is laid down expressly by Lord Lyndhurst in *Small v. Attwood* (1832), 1 Younge 407, 457, and his dictum is quoted as law in Fry on Specific Performance, 3rd ed., p. 119. See also the latest edition of Daniell's Chy. Practice (7th ed.) at p. 175, and the cases there cited. It is true that an action at law could be maintained by the agent in his own name, but the rule in equity has always been to require the person beneficially interested to be brought before the Court, and not to be satisfied with the presence merely of the person having a bare legal title: so that both upon principle and authority the present action seems to be defective by reason of the absence of the real plaintiff.

This objection, however, has not been taken by the defendants in their pleadings, and appears to have been urged for the first time at the trial. Under these circumstances, if there had been no other objections to the making of a judgment for the specific performance of the contract, it might not have been improper to allow the addition of Hamilton as a plaintiff, had an application to that effect been made. Being of opinion, however, that upon the merits of the case such a judgment should not be granted to either Smith or Hamilton, I need not consider the propriety of permitting such an amendment.

The evidence shewed that the land in question was of a speculative and fluctuating character, depending upon the continuance of the sudden rise in the value of property in Sault Ste. Marie. Under these circumstances the established rule is, that a purchaser must act upon his rights with reasonable diligence and promptitude upon pain of losing them if he do not. In the present case the purchaser Hamilton appears to have slept upon his rights even after he had been put at arm's length by Plummer's refusal to treat his bargain with Hughes as any longer binding upon him. What are the facts here?

Plummer's contract to sell to Hughes was made on 1st May, 1900, but he was never paid anything whatever upon the purchase money, although \$50 was to be paid down, and \$200 in six months to be secured by Hughes's note, which never was given. He appears to have forborne to press the purchaser from a desire to help him, and to have been willing for the same reason to allow him to make what he could out of the resale to Hamilton. On 29th August, 1900, Hamilton, having through his agent Smith obtained from Hughes on 29th August, 1900, an option to purchase, seems to have endeavoured from that time to the present to avoid doing anything directly to commit himself personally to an acceptance of the option and to the liability he would incur as a party to it. In his letter of 24th September, 1900, to Hughes he says that "the purchaser" is ready to close the purchase when the objections to the title are removed. On 28th September, 1900, Plummer writes, in effect, saying that the title offered is the only one he can give; and upon a further application on 24th October, 1900, he writes Hamilton's solicitor refusing to pay Kitson anything for a quit claim.

From this date until the 3rd April following Hamilton seems to have done absolutely nothing so far as Plummer is concerned, but on that date he sent him for execution a conveyance which Plummer tore up and threw away, telling Mr. Andrew Elliott, the solicitor for Hamilton, that owing to the delay he would not carry out the contract. At this time the possession of the land was vacant; that is to say, Hughes was no longer carrying on the business of making brick there, although the plant and machinery which were there at the time

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he purchased still remained there. Here was plain notice to Hamilton on the 3rd April, 1901, that Plummer refused on the ground of delay to carry out the contract, and he thereby put Hamilton at arm's length. On the 9th April, 1901, Hamilton brought the present action in the name of Smith against Hughes alone, but took no other steps whatever until the 24th October, 1901, when he obtained an order adding Plummer as a party defendant, and then served the writ on him as well as on Hughes. If Plummer had been made a defendant at the time the writ was issued, the action might have been brought down to trial on the 18th June, 1901, at the summer assizes then held at Sault Ste. Marie, or on the 9th December, 1901, at the winter assizes held there. Instead of which, it was delayed by the action of the plaintiff until the summer assizes held in July, 1902. Not being then reached, it was not actually tried until the winter assizes of 1902, not having been entered at the special sittings held early in November, 1902, for the trial of this and other cases which had not been reached in the previous July. The result is, that, by the neglect of Hamilton to assert his rights after notice that Plummer denied them, there has been a full eighteen months' delay in bringing the question on for decision. More than this, Hamilton, by bringing his action in the name of his agent, who has no interest in the matter, appears to have endeavoured to protect himself from liability to Plummer and Hughes for the purchase money and the costs of the proceedings, for the foundation of any right whatever on his part against Plummer must have been an offer to carry out Hughes's contract with Plummer: see *Dyer v. Pulteney* (1740), Barnardiston (Ch.) 160.

It appears to me that the whole course of the proceedings on Hamilton's part, after October, 1900, are open to the charge that he has been endeavouring to keep alive his claim to the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy it, in case it should happen to depreciate in value.

In *Huxham v. Llewellyn* (1873), 21 W. R. 570, at p. 571, Lord Selborne says that in these cases the question is entirely one as to what is a reasonable time, and not whether the delay

has been one of twelve months or any definite number of months. In that case he held upon demurrer that in a purchase of a colliery a delay of five months in taking proceedings after the parties were at arm's length was unreasonable, and this view was adopted by Malins, V.-C., in the same matter at p. 766 of the same volume.

In *Glasbrook v. Richardson* (1874), 23 W. R. 51, these decisions were approved by Jessel, M.R., who held in an action for the specific performance of the sale of a colliery that a delay of 3 months and 13 days in taking proceedings was fatal. These cases are referred to in Fry on Specific Performance, 3rd ed., with many others, at pp. 503-4-5.

It is plain here that the rights of Hamilton against Hughes entirely depend upon the rights of Hughes against Plummer: those rights, for the reasons I have given, have been lost by the delay in asserting them, and the action must therefore be dismissed with costs as against both the defendants.

The right of the plaintiff to join Plummer at all as a defendant in the action was questioned by the defendants, as he was not a party to the contract sought to be enforced, but there seems authority for this being done under the circumstances here existing. The foundation of the right to join A., the original vendor, in an action for specific performance by a purchaser C. from the original vendee B., seems to be that the purchaser C. is the equitable owner under his contract with B. of B.'s rights against A., and that he may join A. in his action with B. as a co-defendant upon offering to perform B.'s contract with A.: *Dyer v. Pulteney*, Barnardiston (Ch.) 160; *South Eastern R. W. Co. v. Knott* (1852), 10 Hare 122; *Fenwick v. Bulman* (1869), L.R. 9 Eq. 165.

I have omitted to mention that after Plummer had refused to carry out his contract with Hughes, he sold the machinery and plant on the property and gave part of the proceeds to Hughes. He explained this by stating that Hughes had spent money in repairs and additions to the plant and machinery while he was in possession of them, and that the money given him was to recoup him for his outlay.

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Oct. 23.

THE OTTAWA GAS COMPANY.

V.

THE CORPORATION OF THE CITY OF OTTAWA.

Appeal—Leave to Appeal—Solicitor—Payment by Salary—Costs—Taxation.

The solicitor of a municipal corporation was appointed under the terms of a by-law which provided for his receiving a yearly salary of \$1,800 for all services performed by him including costs of litigation incurred on behalf of the corporation, and any costs awarded to the corporation were to be paid over to the city treasurer. This by-law was amended by a by-law providing that all costs payable to the corporation in any action should be paid to the solicitor as part of his remuneration in addition to his salary. After the passing of the amending by-law the corporation claimed to have the right to tax profit costs in an action against the corporation which had been dismissed with costs prior to the passing of such amending by-law.

Leave to appeal to the Court of Appeal from a judgment of a Divisional Court refusing to allow such profit costs having been moved for :—

Held, that having regard to the litigation and the decisions on the subject leave should not be granted.

Jarvis v. Great Western R. W. Co. (1859), 8 C.P. 280; *Stevenson v. Corporation of Kingston* (1880), 31 C.P. 333; and *Meriden Britannia Co. v. Braden* (1896), 17 P.R. 77, referred to.

THIS was a motion by the defendants for leave to appeal to the Court of Appeal from the decision of a Divisional Court reported 4 O.L.R. 656, reversing an order of Street, J., made in Chambers, allowing an appeal from the deputy registrar of the High Court at Ottawa, on a question of taxation.

J. H. Moss, for the motion.

H. T. Beck, contra.

October 23. MOSS, J.A.:—As the case stands at present the defendants have been held not entitled to include in the costs taxable against the plaintiffs any profit costs. The action was finally dismissed with costs on the 14th September, 1901. On that date the solicitor who conducted the defence, and acted throughout the action for the defendants, was under engagement by them at a yearly salary of \$2,500, in consideration of which he was to perform the duties specified in the by-law regulating and defining the duties of city solicitor. One term of the by-law was that all costs awarded to the corporation in any suit should be paid to the city treasurer, and

a detailed statement thereof rendered in May and December of each year.

On the 10th July, 1902, the by-law was amended so as to provide that all costs payable to the corporation in any suit should be paid to the city solicitor as part of his remuneration in addition to his salary.

On the 23rd July, 1902, the defendants brought in their bill of costs in this action for taxation by the deputy registrar, who, on the production by the plaintiffs of the before mentioned by-laws, ruled that the defendants were not entitled to tax profit costs. Upon appeal from this ruling Street, J., held that the defendants were entitled to the benefit of the amendment of the by-law, which brought the case within the provisions of sec. 320 (3) of the Municipal Act.

The Divisional Court was of the contrary opinion, and also held that upon the terms of the by-law prior to the amendment the case was governed by *Jarvis v. Great Western R.W. Co.* (1859), 8 C.P. 280; and *Stevenson v. Corporation of Kingston* (1880), 31 C.P. 333.

The defendants relied upon *Galloway v. Corporation of London* (1887), L.R. 4 Eq. 90; and *Henderson v. Merthyr Tydfil Urban District Council*, [1900] 1 Q.B. 434.

On this motion it was submitted that these cases laid down a rule not in conflict with our own cases and which might be adopted without impinging upon them. It was said that, conceding the correctness of the doctrine that inasmuch as the salary covered all claims of the solicitor against the clients for the costs of conducting the defence, the clients incurred no liability against which they were entitled to be indemnified, it had no application where, as in this case, it was a term of the employment that the costs awarded to the corporation should be received by the city treasurer for its benefit. It was further submitted that if it appeared that *Jarvis v. Great Western R.W. Co.*, and *Stevenson v. Corporation of Kingston* applied, they should be reconsidered in the light of the English cases, and that in any case the question of the effect of the amendment to the by-law was of sufficient importance to justify further discussion in this Court.

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Jarvis v. Great Western R. W. Co. was decided over forty years ago. It was fully considered in *Stevenson v. Corporation of Kingston* over twenty years ago, and was then affirmed, though the opinion of Sir A. Wilson, C.J., was opposed to it. At the next session of the Legislature held after the rendering of the latter decision, the Municipal Act was amended (44 Vict. ch. 24, sec. 5) so as to enable a municipal corporation to collect costs of suits and proceedings, notwithstanding the employment of a solicitor at a salary, when by the terms of the employment such costs are payable to the solicitor as part of his remuneration in addition to his salary. From that time to the present it has been within the power of the defendants in this action to do as they have lately done, viz., make it a term of the employment of their solicitor that costs payable to them by other parties should be received by the solicitor as part of his remuneration in addition to his salary.

Without saying that no case could possibly arise in which it would be proper to review these cases, I think that, having regard to the legislation, and to the prior decisions, and the clear recognition of their authority in subsequent cases, I ought not to give leave to open a discussion of them with a view to the adoption of the rule of the English cases, at the instance of a municipal corporation. So far as this Province is concerned the question is really settled by the judgment of this Court in *Meriden Britannia Co. v. Braden* (1896), 17 P.R. 77. The amount involved is not large, and the defendants have provided for all future cases. I am inclined to agree with the Divisional Court that the date of the judgment governs the plaintiffs' liability to the defendants for costs, but I express no decided opinion. I only say that I think no sufficient reasons have been shewn for treating the case as exceptional and allowing a further appeal.

The motion must be dismissed.

G. F. H.

[DIVISIONAL COURT.]

THE DUNLOP PNEUMATIC TYRE CO., LIMITED,

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July 9.

Oct. 24.

Dec. 22.

Pleading — Action by English Company — Counterclaim — Breach of Contract — Defendant by Counterclaim out of Jurisdiction — Conspiracy to Defraud.

The plaintiffs, an English company, brought an action against the defendants, in Ontario, to restrain them from exporting goods to and interfering with their business in Australia, in breach of certain agreements; and the defendants, besides setting up as a defence certain breaches of the agreements by the plaintiff company, counterclaimed against the plaintiff company for damages for such breaches; for a declaration of their rights as to trade with Australia; and a rectification of the agreements, to make them conform to the representations of the plaintiff company. The defendants also counterclaimed against the plaintiff company, G. & P., two persons not parties to the action, one resident in Ontario and one in Australia, and an Australian company, alleging a conspiracy by them to defraud and cheat the defendants out of certain rights to trademarks they were entitled to in Australia under the agreement by the plaintiff company assigning said trademarks to said G. & P. who, with the Australian company, fraudulently put in force the trademark laws of Australia and prevented the defendants exporting their goods to Australia and obstructed them in their business:—

Held, that the claims made in the counterclaim against the plaintiff company alone were proper subjects of a counterclaim in the action. But

Held, also, that there was no such intimate connection between the subject of the action and the subject of the counterclaim against three other parties, only one of whom was resident within the jurisdiction or had admitted the jurisdiction of the Court, as to oblige the Court to require both to be disposed of in the same action.

South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord, [1897] 2 Ch. 487, followed.

APPEAL by defendants, The Dunlop Tire Company, Limited, from a judgment of Street, J., reversing in part a judgment of the Master in Chambers refusing to strike out a counterclaim under the circumstances hereinafter set out.

The following facts are taken from the judgment of Street, J., on the appeal before him:—

The action is brought by the Dunlop Pneumatic Tyre Company, Limited (hereinafter referred to as “the English Company”) against Ryckman, Cox, Gurney, Soper, The Dunlop Tire Company, Limited (hereinafter referred to as “the Canadian Company”), and the American Dunlop Tire Company (hereinafter referred to as “the American Company”).

The plaintiffs, the English Company, in their statement of claim, say that they had for some years carried on business in

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Canada as makers of and dealers in rubber tires, and that they had also carried on the same business in the United States of America under the name of the defendants, the American Company, owning the whole of the stock of that company; that on 13th December, 1898, they sold out to the defendant Ryckman all their Canadian and American business and goodwill, including all the shares in the American Company, and their patents and rights of invention and trademarks for Canada and the United States; that the defendant Ryckman by the agreement contracted to give his assistance in carrying on the plaintiffs' business outside the continent of America, and that he would not directly or indirectly compete with the plaintiffs in any business outside the continent of America; and that he would not export any tires to any country outside the continent of America where a patent existed for tires, except where tires were actually fitted to and sold with the wheels of bicycles or other vehicles, and that by the said agreement the rights of patentees were fully reserved in the countries or markets outside the United States and Canada where patents existed; that by the agreement it was declared that Ryckman might assign it, but that any assignment by him should contain a covenant making the terms of the agreement binding on the assignee and its assignees; that Ryckman really acted as agent in the matter for the defendants Cox, Soper and Gurney, who afterwards, along with one Garland, formed and became four of the directors of the Canadian Company, to which Ryckman upon its formation transferred the right acquired under the agreement he had entered into with the English Company, so far as the same related to the Dominion of Canada; and that he transferred to the American Company the rights under the agreement so far as they relate to the continent of America outside Canada; that all the defendants were aware of the terms of Ryckman's agreement with the plaintiffs when such assignments were made; that the defendants have broken the agreement by competing with the plaintiffs in their business in countries outside the continent of America, and by exporting tires not fitted to vehicles to countries outside the continent of America where no patent existed for tires; and that the defendants Ryckman, Cox

Soper and Gurney have broken the said agreement by not binding their assignees to observe the said agreement, or by refusing to produce the assignment containing a stipulation binding their co-defendants the Canadian and American companies, if such stipulation exists; that the American Company has expressly repudiated any obligation to be bound by such agreement, and has claimed and acted on the right to export tires whenever they choose; that by reason of the premises the plaintiffs' business in countries outside the continent of America has been injured, and claims for damages have been made upon them by the Dunlop Pneumatic Tyre Company of Australasia, Limited, to whom the plaintiffs have sold their business in Australasia. The plaintiffs claim specific performance of the agreement of 13th December, 1898, by all the defendants; an injunction restraining future breaches of it, and damages for past breaches of it.

The defendants, the Canadian Company, in their defence set up that although the plaintiffs professed in the agreement of 13th December, 1898, to be the owners of all the property and goodwill of the American Company and to sell it to Ryckman, as a matter of fact they were not, and the Canadian Company had to purchase from the American Company the right to do business in Canada for a large sum of money; they deny any breach of that agreement; they say that the plaintiffs have assigned to the Dunlop Pneumatic Tyre Company of Australasia all their goodwill and other rights to carry on business in the Australasian colonies, and that the latter company or its assigns, and not the plaintiffs, have the sole right to complain of any breaches affecting their trade in the Australasian colonies, and to recover damages, if any, therefor. They further say that before the date of the agreement of 13th December, 1898, the American Company had carried on a large business in the Australasian colonies upon the orders of Canadian bicycle manufacturers; that by the agreement in question the Canadian Company became entitled to all the rights of the American Company, including the right to continue the business with the Australasian colonies aforesaid, and that the plaintiffs, when making the said agreement, represented to Ryckman that they had no patents in the said

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colonies, and that therefore Ryckman and his assigns would be permitted by the terms of the agreement to continue to carry on the said business with the said colonies, but that the plaintiffs now pretend that they have patents there, and that the defendants are therefore, by the terms of the agreement, prevented from carrying it on.

By way of counterclaim the said defendants, the Canadian Company, claim:—

(a) Damages for breach of the agreement of the plaintiffs to transfer to the said defendants the patents and goodwill of the American Company.

(b) A declaration of their rights in respect of the Australasian trade, and if necessary, a rectification of the agreement so as to make it conform to the representations of the plaintiffs to Ryckman.

(c) A similar declaration as to their trade with other countries outside America.

Then follows the statement of facts upon which the defendants, the Canadian Company, base their further counterclaim which is the subject of the present contest.

They say that they became by virtue of the agreement of 13th December, 1898, entitled to certain trademarks in Canada and to use them in respect of all tires manufactured by them and exported to other countries; but that Garland and Palmer (two persons not parties to the action, but whom the defendants seek to bring in as defendants to the counterclaim) knowing the rights of the Canadian Company to the trademarks, conspired with the plaintiffs, the English Company, to defraud and cheat the plaintiffs by appropriating to their own use the said trademarks in Australia through the medium of a company formed by the plaintiffs, then called "The Dunlop Pneumatic Tire Company (Australasia)," in whose name they caused the said trademarks to be registered in Australia with the object of preventing the defendants, the Canadian Company, from using the said trademarks there; that the last mentioned Australasian company had then assigned its rights to the said trademarks to another company made defendants by counterclaim, called the Dunlop Tire Company of Australasia, Limited, who took with knowledge of the rights of the

Canadian Company; that all the defendants by counterclaim then proceeded, in pursuance of their conspiracy, fraudulently to put in force the trademark laws of the said Australian colonies against tires made in Canada by the defendants, the Canadian Company, and exported thither, and obstructed them in their business there.

They ask for damages for the alleged conspiracy, a declaration of their rights, and an injunction.

The plaintiffs, who were also defendants to the counterclaim, moved to strike out the counterclaim, and the motion was argued before Mr. Winchester, the Master in Chambers, on 25th June, 1902.

The grounds taken were :

"1. That the questions attempted to be raised by such counterclaim are now being litigated and disposed of in a proceeding in Australia, with reference to whose laws the matters in question and endeavoured to be raised by the counterclaim require to be dealt with.

2. That the plaintiffs have nothing to do with the matters mentioned in the counterclaim, not having been parties thereto.

3. That it will not be convenient or proper to try the said counterclaim in this action, but the same should be tried (if at all in this Province) by an independent action.

4. That the said counterclaim is vexatious, and discloses no cause of action against the plaintiffs.

5. That the said counterclaim is not properly pleaded or authorized by the practice; and

6. That the said counterclaim tends to embarrass the plaintiffs and delay the fair trial of this action."

W. M. Douglas, K.C., for the motion.

W. E. Middleton, contra.

July 9. THE MASTER IN CHAMBERS (after setting out the pleadings and counterclaim):—It is this counterclaim that the plaintiffs are moving to strike out on the grounds above mentioned. The application is supported by an affidavit of one of the solicitors of the applicants, and which has been answered

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by an affidavit of one of the solicitors of the plaintiffs in the counterclaim.

The counterclaim arises out of the same subject-matter or contract which the plaintiffs are proceeding upon, and in my opinion it is proper, and no inconvenience will necessarily be added by its trial in this action. It may be that one or more of the defendants may not defend the claim against them by it; but I do not think that a sufficient reason why it should be disallowed. Other reasons for striking it out were advanced by counsel, but I am of opinion that the plaintiffs in the counterclaim are entitled to have it tried at the same time as the original action will be disposed of, and not be compelled to bring another action for the purpose.

The motion will be dismissed with costs to the plaintiffs in the counterclaim, in any event, as against the applicants.

From this judgment the plaintiffs in the action appealed to a Judge in Chambers, and the appeal was argued on the 19th of September, 1902, before STREET, J.

Douglas, K.C., for the appeal.

Middleton, contra.

October 24. STREET, J. (after setting out the pleadings and counterclaim as above):—The action is brought by the English Company to restrain the defendants from exporting pneumatic tires from this continent and competing with the plaintiffs in their business in other parts of the world contrary to the terms of the agreement of 13th December, 1898, which the plaintiffs say is binding upon all the defendants.

The defendants, the Canadian Company, deny that the agreement is binding upon them, but say that if it is, it does not represent the real bargain which was made between the plaintiffs and Ryckman, and they claim a rectification of it.

They further say that the plaintiffs did not deliver the whole of the rights of the American Company as they agreed to do in the agreement, and that the Canadian Company had been obliged to pay large sums to obtain these rights, and they asked that the plaintiffs be ordered to repay these sums and the damages they have been put to in consequence.

They further ask for a declaration of their rights under certain parts of the agreement.

All these claims are put in the form of a counterclaim by the Canadian Company against the plaintiffs alone, and in my opinion they are very proper subjects for a counterclaim in this action.

The remainder of their counterclaim is, however, of a much wider character. It alleges that under the proper construction of the agreement of 13th December, 1898, the Canadian Company is entitled to the use of certain trademarks in connection with tires exported by them to countries outside America; but that the plaintiff, along with two persons, Garland and Palmer, and an Australian Company, none of whom are parties to the action, have fraudulently and with knowledge of the rights of the Canadian Company, conspired together to cheat them of their rights by registering the said trademarks in the name of the Australian Company, and they ask for an injunction and damages against Palmer, Garland, the Australian Company, and the plaintiffs.

The complaint of the Canadian Company in this part of the counterclaim is that the defendants to the counterclaim, by certain acts done in Australia, have interfered with their trade there.

Of the defendants to the counterclaim, Palmer is the only one within the jurisdiction of the Court; Garland lives in Australia, and the Australian Company has its head office there. The plaintiffs in this action, who are the remaining defendants to the counterclaim, have their head office in England, and have neither business nor offices in Ontario. None of the parties defendants to the counterclaim, except the defendant Palmer, have pleaded to it or admitted the jurisdiction of the Court.

I think an examination of the pleadings and of the issues sought to be raised by the counterclaim against the new parties is sufficient to establish the injustice to the plaintiffs of allowing the question of the Australian trademark to be raised and disposed of in the present action.

It is manifest that great delay must necessarily be encountered in taking the evidence, which must be taken in Australia

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as well as in England, in disposing of the question of the trade-marks. In the meantime the defendants, the Canadian Company, have everything to gain and nothing to lose by the delay, for they will, of course, continue to carry on the foreign business which the plaintiffs seek in the action to restrain.

I can see no such intimate connection between the subject of the action and the subject of the counterclaim, as to oblige the Court to require both to be disposed of in the same action. I can see that to allow the counterclaim would operate as so great a hardship upon the plaintiffs as to amount almost, if not entirely, to an actual denial of justice to them, and I am therefore of opinion that the appeal should be allowed as to that portion of the counterclaim which begins with the sixteenth paragraph of the defence and counterclaim, and relates to the claim against the plaintiffs, Garland, Palmer and the Australian Company, in respect of the trademark, and that this portion of the counterclaim should be excluded, with the right, of course, to the Canadian Company to make it the subject of a separate action if so advised.

The remainder of the counterclaim was not objected to, and should stand, and the defendants, the Dunlop Tire Company, Limited (called herein the Canadian Company) should pay the costs of the application and appeal.

From this judgment the plaintiffs in the counterclaim appealed to a Divisional Court, and the appeal was argued on the 5th of December before BOYD, C., and MEREDITH, J.

Shepley, K.C., for the appeal. The defendant Ryckman by agreement and for a large payment of money obtained all the English company's rights on this continent both in the United States and Canada, and certain other rights such as exporting tires on wheels to other countries where the plaintiffs had patents and trademarks, and unrestricted rights where they had no patents or trademarks. The plaintiffs should not claim against the defendants under the agreement, and refuse them the right to set up a breach of the agreement by themselves. It may be true that some of the defendants in the counterclaim are not within the jurisdiction of the Court, but one of them is, and he joined with our own manager and the plaintiffs

in a conspiracy to prevent our getting the full benefit of the plaintiffs' agreement by an unfair resort to Australian laws. We are entitled to meet the plaintiffs' claim in the Court they have chosen, and they should submit to any proper counterclaim which can be set up in any action, even where there is no jurisdiction to bring an action for the subject of the counterclaim: *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487, at p. 492.

Aylesworth, K.C., *Douglas*, K.C., and *John Greer*, contra. All the English Company sold to the defendant Ryckman in the way of trademark was the trademark for the United States and Canada as protected by statutes in those countries. We seek an injunction to restrain trade with other countries where we were not to be interfered with. The counterclaim alleges a conspiracy to use the trademark, which we never sold except as to the United States and Canada, and is against the plaintiffs and three new parties, only one of whom is within the jurisdiction. Great delay would arise to the detriment of the plaintiffs, and the defendants will not be injured or delayed if not allowed to counterclaim: *McLay v. Sharp*, W.N., 1877, p. 216; *Lynch v. Macdonald* (1887), 37 Ch. D. 227; *Gray v. Webb* (1882), 21 Ch. D. 802, at p. 805; *Central Bank of Canada v. Osborne* (1887), 12 P. R. 160; *Huggons v. Tweed* (1879), 10 Ch. D. 359; *The Metropolitan Board of Works v. The New River Co.* (1876), 2 Q. B. D. 67. As to territorial jurisdiction, see *Sidar Gurdial Singh v. The Rajah of Faridkote*, [1894] A. C. 670. There are two counterclaims which could not be combined in one action against the English Company and the other three defendants by counterclaim, Garland, Palmer and the Australian Company: *Gower v. Gouldridge*, [1898] 1 Q. B. 348. The discretion exercised by the Judge in Chambers to exclude this counterclaim was rightly so exercised, but even if erroneously exercised ought not to be interfered with by the Court.

Shepley, in reply. *Gower v. Gouldridge* was distinguished in *Kent Coal Exploration Co., Ltd., v. Martin*, [1900] 16 Times L.R. 486. See also *Evans v. Jaffray* (1901), 1 O.L.R. 614.

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December 22. BOYD, C.:—The defence of the Canadian Company sets up certain rights against the plaintiffs under the agreements, of 13th December, 1898, and 27th January, 1899, and also sets up certain rights under the said agreements as extended by means of certain representations (paragraph 13).

Then there is a counterclaim against the English Company, plaintiffs in respect of trademarks and goodwill, as to which a breach of the agreement is alleged, and it is asked that it be specifically performed.

Then a further counterclaim against the plaintiffs based upon the said representations, and asking rectification of the agreements in that regard.

Then comes the pleading of a yet further counterclaim against the plaintiffs and others, all (but one) resident out of Ontario, setting up a conspiracy to defraud out of the beneficial use of the trademarks in the Australian trade by the registration of the trademark in that Commonwealth, and as to which the defendants seek to rely not only on the agreements but also on the representation by which the agreement is to be extended; all the paragraphs objected to referring to and incorporating therewith paragraph 13 of the defence and counterclaim.

On this last counterclaim the only measure of relief will be in the way of damages against the British Company and the strangers to the action brought in to the counterclaim, and it is nowhere alleged that all such damages cannot be recovered from the British Company. The acts of conspiracy alleged all go to shew that there has been a breach or violation of the basal agreement as construed by the Canadian Company or as extended by means of the representations relied on.

There is no need to embark in a wide field of enquiry in this action in order to make out the alleged wrongdoing of the British Company. No reason is alleged shewing that it is needful for the ends of justice to bring in the new parties to the counterclaim, while the inevitable effect will be to lengthen and complicate an inquiry which already promises to be cosmopolitan in its scope.

The case cited for the appellant, *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*,

[1897] 2 Ch. 487, at p. 492, is an authority the principle of which supports the order in appeal.

Chitty, L.J., says at p. 490: "If the plaintiff were an individual, should we not say to the defendants, 'Do not mix up a libel action with an action for the protection of a trust fund.'" And so it was decided, even though it might not be competent to bring plenary suit for the libel against the foreign plaintiff.

This counterclaim for conspiracy is in the same category of complaint as an action for libel: both savour of crime, though civil relief is also available.

The action in this case brought by the plaintiff is for specific performance against the Canadian Company. That company claims damages for alleged breaches in the agreements sued on and also, as noted above, seeks to rectify the agreement and have it specifically enforced, and seeks further for damages based on that rectification. To this well defined and separable litigation on equitable grounds, it is sought to engraft this common law action for conspiracy against strangers to the record, and the reasons which prevailed in the case cited equally apply here against such amalgamation of controversies: see also *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190, at p. 197.

The order should be affirmed with costs, with leave to apply to amend the counterclaim as against parties to the original record.

MEREDITH, J.:—A foreigner bringing an action in this Court subjects himself to the ordinary course of procedure in such an action, including a defendant's right to counterclaim; but in exercising the power conferred by Rule 254, the fact that no action could have been brought here in respect of such claim may, in some cases, be important.

It, however, does not necessarily follow that he thereby brings other persons, not parties to the action, within the jurisdiction of the Court.

Here the action is in respect of an alleged breach of contract; the counterclaim is not in respect of any breach of that

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or any other contract, but is for a wrong, a conspiracy to do a civil wrong, alleged to have been entered into and carried out by the plaintiff together with the three added parties.

The injury is said to have been done in Australia under the laws of that country, and none of the parties to it now are, or carry on business, within the jurisdiction of this Court.

The substantial relief sought is an injunction.

Obviously no such injunction could be enforced against any of these foreigners, and admittedly no action would now lie here against any of them for any such relief.

The cause of action is essentially Australian: the alleged wrong done there, done under the statute law of that country, and directly by the Australian Company, carrying on its business there, where alone full relief can be enforced in favour of the plaintiffs in the counterclaim, if they are entitled to any: where the witnesses reside, and where their evidence must be taken, as well as where all the injury complained of is said to have been done: and where also competent proceedings to right the wrong, if there really has been any, are now depending, which, if successful, will enure to the benefit of these plaintiffs by counterclaim as much as to the benefit of the other like company carrying them on.

The circumstances are such that, that, upon the lowest ground, we cannot rightly interfere with the discretion of the learned Judge at Chambers. I indeed think the order was rightly made, and that the view of the Master in Chambers was erroneous.

There is nothing to prevent the respondents amending and making, if they can, a counterclaim which will be within their right under the practice, having regard to the jurisdiction of the Court, and just and reasonable notwithstanding the plaintiffs' position, and that the Court would have no jurisdiction if an action were brought.

G. A. B.

[BRITTON, J.]

HUTCHINSON v. McCURRY.

1903

Feb. 16.

Foreign Law—Quebec Code of Civil Procedure—Recovery of Costs—"Distraction" Attorney's Right to Recover Without Intervention of Client.

"Distraction of costs" as provided for in sec. 553 of the Code of Civil Procedure in the Province of Quebec is the diverting of costs from the client or party who in the ordinary course would be entitled to them and their ascription to his attorney or other person equitably entitled.

Plaintiffs were the attorneys on the record for one R. against whom an action was brought in the Province of Quebec by the defendant and an interlocutory motion therein had been dismissed with costs, taxed at \$238.20 and judgment entered therefor in the Superior Court at Montreal. The defendant had recovered a judgment against R. in this Province and sought to set it off *pro tanto* against the judgment for costs :—

Held, that the plaintiffs were entitled to recover such costs from the defendant in their own names in Ontario without the intervention of their client.

THIS was an action brought by the plaintiffs who had acted as attorneys in the Province of Quebec for one W. G. Reid in an action brought against him in that Province by the defendant in this action during the progress of which an interlocutory motion had been dismissed with costs, subsequently taxed at \$238.20, in favour of Reid by an order of the Superior Court in Montreal.

The action was tried on the 28th of January, 1903, at Toronto, before BRITTON, J., without a jury.

W. E. Middleton, and *W. R. Cavell* for the plaintiffs.

C. E. Hewson for the defendant.

At the trial it was shewn that a judgment had been recovered by the defendant against Reid for upwards of \$10,000 in Ontario, which was still unsatisfied, and it was contended that such judgment should be set off *pro tanto* as satisfaction of the judgment for the costs.

The plaintiffs claimed a right to sue in their own name alone for the costs and recover them for their own benefit.

February 16. BRITTON, J. :—An action brought by plaintiffs, who acted as attorneys in the Province of Quebec, for one W.

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G. Reid, in an action brought against him by the now defendant.

The point raised in this action is the entirely novel one, viz., the right of attorneys of the Province of Quebec to bring an action, in their own name, without the intervention of their own client, who was successful there, against the unsuccessful party for the taxed costs of a motion carried to appeal in that Province.

To entitle the plaintiffs to succeed in this action they must have either in form or by operation of law a judgment in their own favour in the Province of Quebec.

The plaintiffs say they have this. They are the attorneys on the record in the action in that Province, in which the now defendant was the plaintiff, in which action costs were awarded against the now defendant. The judgment in that action, as proved by the exemplification of it, is a judgment in the Superior Court at Montreal rendered by the Court of Queen's Bench, Appeal Side, on the 27th day of October, 1900, dismissing a motion of the now defendant, with costs against the now defendant.

Section 553 of the Code of Civil Procedure of the Province of Quebec is as follows:—

“Every condemnation to costs involves by operation of law distraction in favour of the attorney of the party to whom they are awarded.”

They were awarded to Reid. The plaintiffs were the attorneys for Reid in that action. Reid could not without the consent of the plaintiffs execute that judgment for these costs, and that consent must appear on the fiat for the issue of the writ of execution. See sec. 555 of the Code.

The evidence before me shews that the costs were properly taxed, that they became payable after fifteen days from taxation, and that these costs have not been paid. The costs were taxed at \$238.20.

“Distraction of costs” was proved by one of the plaintiffs to mean, what it is said in Murray's English Dictionary to mean, namely, “the diverting of costs from the client or party who would in the ordinary course be entitled to them, and their ascription to his attorney or other person equitably entitled.”

These costs would carry interest in the Province of Quebec, but in this case there is no claim for interest, and there is no evidence of any demand in the Province of Ontario before action; so the judgment will be for the plaintiffs for \$238.20, with costs.

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[IN CHAMBERS.]

McKELVEY v. CHILMAN.

1903
Feb. 9.

*Costs—Trespass to Land—High Court Action—Payment of \$1.00 into Court
Acceptance by Plaintiff—High Court Scale—Con. Rule 425.*

In an action for trespass to land valued at over \$200 in which the plaintiff claimed \$2,000 damages, no question of title to land being raised, the defendant paid \$1.00 into Court and the plaintiff accepted it:—

Held, that the plaintiff was entitled to his costs on the High Court scale.

Babcock v. Standish (1900), 19 P.R. 195, followed.

MOTION by the defendant to set aside the taxation of costs and for an order directing taxation on the division court scale, allowing set-off, etc., under Rule 1132,* argued in Chambers on the 2nd February, 1903, before BRITTON, J.

James Dickson, for plaintiff.

J. L. Counsell, for defendant.

February 9. BRITTON, J.:—This is covered by authority. I must follow *Babcock v. Standish* (1900), 19 P.R. 195. It is somewhat difficult for me to distinguish that case from the

*1132. Where an action of the proper competence of a County Court is brought in the High Court, or an action of the proper competence of a Division Court is brought in the High Court, or in a County Court, and the Judge makes no order to the contrary the plaintiff shall recover only County Court costs, or Division Court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between solicitor and client, and so much thereof as exceeds the taxable costs of defence which would have been incurred in the County Court or Division Court, shall, on entering judgment, be set off and allowed by the Taxing Officer against the plaintiff's County Court or Division Court costs to be taxed, or against the costs to be taxed and the amount of the verdict if it be necessary; and if the amount of costs so set off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff.

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cases of *Chich v. Toronto Electric Light Co.* (1887), 12 P.R. 58, and *Tobin v. McGillis* (1886), 12 P.R. 60. These cases were not cited on the argument or referred to in the judgment of *Babcock v. Standish*.

The present action is for trespass to land. The land, as shewn by affidavit, is of value exceeding \$200. The plaintiff claimed in his statement of claim \$2,000 damages. Apparently the action was properly brought in the High Court.

The defendant paid \$1 into Court, and the plaintiff has thought proper to accept it "rather than proceed further with the action."

This is a personal action, but the amount claimed was \$2,000. The jurisdiction of the division court is only in such a case up to \$60, and of the county court only up to \$200.

No question as to the title to land is raised by the defendant. And the plaintiff's right to costs is simply because, under Rule 425†, he is in such a case offered "his costs as an inducement to this termination of the litigation."

The motion must be dismissed with costs.

†425. When the plaintiff takes out money in satisfaction of all the causes of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within forty-eight hours after taxation.

G. A. B.

[MACMAHON, J.]

DAIGNEAU V. DAGENAIS.

1903

Mortgage—Costs—Excessive Demand—Tender.

Feb. 14.

Demanding much more than is afterwards found to have been due is not such misconduct on the part of a mortgagee as will deprive him of his costs. To relieve the mortgagor from liability to costs he must make an unconditional tender of the amount actually due.

MOTION for judgment, heard in Weekly Court at Ottawa, on the 10th February, 1903, before MACMAHON, J., in whose judgment the facts are stated.

A. E. Lussier, for the plaintiff.

Taylor McVeity, for the defendant.

February 14. MACMAHON, J.:—Motion on behalf of the plaintiff for an order confirming the report made by the local Master at Ottawa, dated the 10th, and filed the 13th, of January, and for final judgment pursuant to the said report, and also for an order for payment by the defendant to the plaintiff of the costs of the action and fixing the day of payment, etc.

The action is brought by the plaintiff as mortgagee of a lot in the village of St. Joseph in the township of Gloucester, in the county of Carleton, claiming payment of the mortgage money, interest, etc., and possession of the lands, etc.

The only question argued before me was as to the costs of the action.

There is no doubt the plaintiff was making a demand for a sum much in excess of the amount due under the mortgage of the 5th of February, 1897, which by the agreement of the 30th of June, 1898, was adjusted and fixed between the parties at \$228, which sum was to be paid in fifty-seven instalments of \$4 each. This agreement, the learned Master states in the reasons for his judgment, was merely supplemental to the mortgage.

The consideration expressed in the mortgage was \$400, but only a part of the consideration was then advanced, for which the plaintiff took the defendant's note, and as subsequent

MacMahon, J. advances were made, notes were taken by the plaintiff from
1903 the defendant, all of which were delivered up to the defendant
DAIGNEAU at the time of the execution by the parties of the agreement of
v. the 30th of June, 1898. The plaintiff, at the time the action
DAGENAIS. was brought, claimed the \$400 as being due under the mortgage. The defendant before action tendered \$152 to the plaintiff and paid that sum into Court in full satisfaction of the plaintiff's claim. The report of the Master shews that the amount due the plaintiff at the date of the issue of the writ was \$229.78, and the amount due at the date of the report \$240.29.

In *Cotterell v. Stratton* (1872), L. R. 8 Ch. 295, at p. 302, Lord Chancellor Selborne said:—"The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption." See also *Turner v. Hancock* (1882), 20 Ch. D. 303.

The mere fact of the mortgagee claiming more than is due is not such misconduct as will deprive him of costs. In *Loftus v. Swift* (1806), 2 Sch. & L. 642, it is said the rule is very precise that in the absence of a tender of the whole amount due to him, the mortgagee is entitled to his costs of suit although he demands more than is due. And Lord Hardwicke said in *Gammon v. Stone* (1749), 1 Ves. Sr. 339: "There are several cases of mortgages in which, though very reasonable proposals may be made, yet if there is no proof of an actual tender, the Court on a bill to foreclosure never refuses costs." And in *Garforth v. Bradley* (1755), 2 Ves. Sr. 675, it was held that if the tender is not such as would, according to the rule of the Court, stop interest, it will not deprive the mortgagee of his costs. And Fry, J., said in *Trotter v. Maclean* (1879), 13

Ch. D. 574, at p. 588, when defendants desire to stay their liability to costs in an action, they must make a clear unconditional offer, equivalent to the whole right of the plaintiff at the time.

See also *Church v. Bishop* (1751), 2 Ves. Sr. 371, at p. 373; *Sentance v. Porter* (1849), 7 Hare 426; *Williams v. Sorrell* (1799), 4 Ves. 389; Fisher's Law of Mortgages, 5th ed., sec. 1851; Robbins' Law of Mortgages, pp. 710, 711.

As a mortgagor can always protect himself from payment of costs by making a tender of the amount due for principal and interest, and as that was not done in this case the plaintiff is entitled to his costs.

The judgment will be for payment by the defendant of the amount found due by the Master, with interest within six months, and in default a sale or foreclosure of the mortgaged premises as defendant may elect upon the settlement of the judgment. The plaintiff will be entitled to his costs of the action, which when taxed will be added to his claim.

Order for foreclosure as prayed.

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REX EX REL. WARR V. WALSH.

Feb. 12.

Municipal Corporations—Election of Councillors—Time of Holding Nomination.

Notwithstanding the Municipal Amendment Act, 1898, the nomination of candidates for the office of councillor, in towns having a population of not more than five thousand persons, and where the election is to be by general vote, may take place at the same time and place as the nomination for mayor, and therefore at ten o'clock in the forenoon.

Semble, an error in this respect as to the time and place of the nomination would come within the curative provisions of section 204 of the Municipal Act, R.S.O. 1897, ch. 223, and would not be a fatal objection to the validity of the subsequent election.

Judgment of the Master in Chambers reversed.

AN appeal by the defendants from an order of the Master in Chambers setting aside their election as councillors of the town of Brampton, was argued before MEREDITH, C.J.,C.P., in Chambers, on the 9th of February, 1903.

T. J. Blain, and *D. O. Cameron*, for the appellants.

E. G. Graham, for the relator.

February 12. MEREDITH, C.J.,C.P.:—This is an appeal from an order of the Master in Chambers made on the 4th of February, 1903, setting aside the election of the appellants as councillors of the town of Brampton, and directing a new election to be held.

The sole ground upon which the validity of the election is attacked is that the meeting for the nomination of candidates which resulted in the election by acclamation of the appellants took place at ten o'clock in the forenoon and not at noon, the latter hour being that at which, as the relator contends, it was required to be held according to the provisions of the Municipal Act.

The appellants contend that the meeting was rightly held at ten o'clock in the forenoon, and that even if it be that noon was the proper hour, the election is saved by section 204 of the Act.

In each of the years from 1898 to 1902 (inclusive) the municipal council of those years provided by by-law that the

nomination for councillors should be held at the same time and place as the nomination for mayor, that hour being ten o'clock in the forenoon, and this they assumed to do under the authority of sub-section 2 of section 118 of the Act.

The learned Master was of opinion that the council had no power [the division of the town—it having a population of not more than five thousand—into wards having been, as he thought, abolished by the legislation to which I shall afterwards refer] to provide for the meeting for the nomination of councillors taking place at ten o'clock in the forenoon; that noon was the hour of the meeting fixed by the Act, and that, not having been held at that hour, the election was void, the curative provisions of section 204 relied on by the appellants not being, as he held, applicable to such a departure from the imperative provisions of the Act as, as he determined, had taken place.

The question as to the power of the council to pass the by law providing that the meeting for the nomination of councillors should take place at the same time and place as that for the nomination of the mayor, is involved in some obscurity and difficulty, owing to the careless manner in which the changes effected by the Municipal Amendment Act, 1898, as to the election of councillors of towns having a population of not more than five thousand, were engrafted upon the Municipal Act, R.S.O. 1897, ch. 223.

Prior to the Act of 1898 the councils of all towns consisted of the mayor and a prescribed number of councillors for each ward; the meeting for the nomination of candidates for mayor was required to be held annually on the last Monday in December, at ten o'clock in the forenoon, while that for the nomination of candidates for councillor was required to be held on the same day at noon; the place of meeting for the nomination of candidates for mayor was the hall of the municipality, and for the nomination of candidates for councillors such place in each ward as should from time to time be fixed by by-law, but power was given to the council to provide by by-law that the nomination for councillors for the several wards should be held at the same time and place as the nomination for mayor.

By the amending Act a change in the constitution of the

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Meredith, C.J. council and the mode of electing councillors in towns having a population of not more than five thousand was made.

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Instead of there being as before a prescribed number of councillors for each ward, the number of councillors was fixed at six, and instead of being elected by wards, they were all to be elected by a general vote.

It seems to have been thought by the draughtsman of the amendment that sub-section 1 of the added section (71a) had the effect of abolishing, in the case of towns to which it applied, their division into wards; at least that would appear to have been his idea, judging from the language of sub-section 2, enabling the council of the town, in certain events, to provide for the division of it into wards; but it is clear, I think, that sub-section 1 has not that effect, and that the only change which is made was that which I have mentioned.

That change, and that only, is all that its language embraces, and all that, when it is remembered that it was necessary to continue the division into wards for the purpose of school elections, it is reasonable to suppose that the Legislature intended to effect. I prefer, therefore, if that be necessary, to treat the language of sub-section 2 as an inaccurate mode of expressing the idea that, on the conditions and in the event mentioned in it, the former mode of constituting the council and of election of councillors may be restored.

As not infrequently happens, the draughtsman did not examine the other sections of the statute which was being amended, to ascertain whether changes ought not to be made in them, so as to make them harmonize with the alteration in the law which was being effected by his amendment, with the result that it becomes necessary to adapt election machinery which was designed for the former and simpler state of things to the new and more complex one, which was not in the contemplation of the Legislature when it provided that machinery.

Endeavouring, then, to adapt the election machinery provided by sections 118 and 119 to the altered state of things, at what hour is the meeting for the nomination of candidates for the office of councillor in the towns to which the amendment applies to be held?

Read literally it is difficult, if not impossible, to make any of the provisions fit the case exactly. Meredith, C.J.

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Section 119 does not apply literally, because in the case of towns the provision is that the meeting is to be held at noon *at such places in each ward* as may be fixed by by-law, and therefore so read is applicable only to towns where the councillors are elected by wards and not by general vote. REX EL REL.
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Again, sub-section 2 of section 118 does not apply literally because the provision is that the by-law may provide that the nomination for councillors *for the several wards* shall be held at the same time and place, etc.

There was no difficulty in applying both provisions as the law stood before the amendment. The election of councillors was in all cases by wards, and unless the council otherwise provided under the power conferred by sub-section 2 of section 118, the meeting for the nomination of councillors was to be held at noon in each ward at a place fixed by by-law of the council, but if the council exercised the power conferred by sub-section 2 of section 118, the candidates for mayor and for councillor were to be nominated at ten o'clock, and at the hall of the municipality.

I see no reason why sub-section 2 of section 118, in order to give effect to the amendment, may not be read as empowering the council, where the election is to be by general vote, to provide by by-law that the nomination of councillors shall be held at the same time and place as the nomination for mayor and to make the same provision in the case of all towns of over five thousand, where the nomination of councillors must still be made for the several wards of the town, or why in the same way section 119 may not be read as providing that the meeting for the nomination of councillors in either case shall, unless the contrary is provided by by-law, be held at noon at the hall of the municipality or such other place in the town as may be fixed by by-law, in case the election is to be by general vote, or at such places in each ward as may be fixed by by-law where the election is to be by wards.

Such a construction of these provisions, in my opinion, does no violence to the language of them, and is not opposed to any of the canons of construction, but, on the contrary, is necessary

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Nor is there anything in this construction opposed to the policy of the Legislature, as indicated in the sections under consideration. If it was its policy, as it admittedly was, where the councillors were to be elected by wards, to permit the council to provide that instead of the nomination meeting being held in each ward and at noon, the nomination for all the wards should take place at the hall of the municipality and at ten o'clock in the forenoon, where and when the candidates for mayor were to be nominated, it is an *a fortiori* case for giving the like power to the council where the councillors are to be elected for the whole municipality, and by general vote.

Upon the whole, I am of opinion, therefore, that the council had power to pass the by-law under the authority of which the nomination for councillors was held at the same time and place as the nomination for mayor, and that the appellants were properly nominated at that meeting and were duly elected.

Having come to this conclusion, it is unnecessary to say whether, had I been of a different opinion, I should have agreed with the view of the learned Master that the provisions of section 204 could not be applied to save the election. That question I have not fully considered, but there is much to be said, I think, in favour of the view that the learned Master would have been warranted in placing a much more liberal construction on the section than was by him given to it.

It is satisfactory, to my mind, that the result which I have reached does no injustice to the relator or to any elector. I do not doubt that upon the facts as they appear in the material before me, had the motion been one for an order *nisi* for leave to file an information in the nature of a *quo warranto* under the old practice, the Court would have been warranted in the exercise of the wide discretion which is vested in it, in refusing leave: *The Queen v. Ward* (1873), L.R. 8 Q.B. 210; *The Queen v. Cousins* (1873), L.R. 8 Q.B. 216; *The State ex rel. Mitchell v. Tolan* (1868), 33 N.J. (Law) 195.

Whether or not, where the proceeding is under the provisions of the Municipal Act and a fiat has been granted under section 220 (1), it is open to the Court to exercise that discre-

tion on the return of the motion, I have not found it necessary to consider.

I have said that in my opinion the result of this appeal does no injustice to the relator or any elector.

Beyond the general statement as to the large number of electors who, in the opinion of the relator and the two gentlemen who made affidavits in support of the motion, were inconvenienced by the nomination meeting having been held at ten o'clock in the forenoon, there is nothing whatever to lead to the conclusion that had the nomination taken place at noon, other electors would have attended, or that the meeting would have had a different result. Not one elector so swears, nor is there even a statement in any affidavit that any elector has said that he would have attended the meeting had it been held at noon, or that he stayed away because it was held at an inconvenient hour.

The nomination meetings had been held at the same hour in and since the year 1899, so far as it appears without objection from any one until now, and with the unanimous consent of the council. The conduct of Mr. South, whose affidavit was filed in support of the motion, while a member of the council, is opposed to the opinion which he expresses in his affidavit, for he was an assenting party to the by-law which fixed the hour at ten o'clock; indeed, he seems to have anticipated that it would be said that his action in the council contradicted his opinion as stated in the affidavit, for he attempts to explain away his action in council, but the explanation does not help him, for though the by-law was drawn by the clerk, he must have known that it was optional with the council to pass it or not.

No word of objection appears to have been raised to the proceedings which the relator is attacking at a time when, if a mistake was being made, it might have been remedied, but the attack was held back until the nomination had been made and the councillors had been elected without opposition.

For these reasons, I think that in allowing the appeal and reversing the order of the Master in Chambers, I should give the costs of all the proceedings to the appellants.

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[DIVISIONAL COURT.]

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Feb. 9.

HAIGHT V. DANGERFIELD.

Will—Construction—Estate for Life—Remainder to Heirs—"Then Surviving."

A testator devised land to his wife "during the full term of time that she remains my widow and unmarried" and subject thereto to two sons "during the full term of time of their natural lives . . . and if either of my said sons should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share of the said lands for the time being, and after the decease of both my said sons, the before mentioned land and premises shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respectful lawful heirs then surviving them share and share alike":—

Held, that the will gave a life estate for the joint lives of the two sons, with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest liver of the two sons.

APPEAL by the plaintiffs from the judgment at the trial.

The plaintiffs were the executors of the will of one Samuel Haight, and brought the action upon a mortgage made on the 20th of January, 1887, by the defendants A. E. Dangerfield and Richard Dangerfield in favour of the said Samuel Haight, to secure the payment of \$1,425 and interest. In this mortgage the mortgagors covenanted that they had a good title in fee simple to the lands in question, which had previously belonged to one James Dangerfield. He died in the year 1860, having, on the 25th of June, 1860, made a will, by the second paragraph of which he gave to his wife "the entire use, benefit and control of my homestead farm" (being the lands in question) "during the full term of time that she remains my widow and unmarried, but should she become married to another man she is still to have the use, benefit and control thereof until my youngest children shall arrive at the full age to do for themselves and not any longer. Provided also that my said children shall have their home, residence and maintenance with their said mother during their minority." By the third clause of the will the testator gave to his wife his personal property and furniture, and the will then proceeded as follows:—

"Fourthly, I give and bequeath unto my two sons, namely, Arthur Eugene Dangerfield and Richard Dangerfield, in equal

shares as to valuation, the use, benefit and control of my before mentioned land and premises during the full term of time of their natural lives, and to come into possession thereof after they shall arrive at the full age of twenty-one years, but not until after their mother's claim shall cease by virtue of the conditions of the before written claim and bequest as given to her by me, but it shall be the privilege of either of them to rent or lease unto the other from time to time as he or they shall think proper, and if either of my said sons should die not leaving heirs, the issue of his own body, his surviving brother shall inherit his share in the said lands for the time being, and after the decease of both my said sons the before mentioned land and premises shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike. Provided also that my two sons as aforesaid shall pay in equal shares alike unto each one of my three daughters (their sisters) or the survivors of them the sum of one hundred dollars when they shall each arrive at the age of eighteen years, and after my said sons shall come into possession of the said lands."

Before the giving of the mortgage in question by A. E. Dangerfield and Richard Dangerfield, the widow of James Dangerfield had married again, and all the children of James Dangerfield had at that time attained the age of twenty-one years. The plaintiffs brought the action against A. E. Dangerfield and Richard Dangerfield, as mortgagors, Lucy Dangerfield, the wife of A. E. Dangerfield, who had joined in the mortgage to bar her dower, and the five children of A. E. Dangerfield and Richard Dangerfield, some of the latter being infants under the age of twenty-one years. They asked in the action for a declaration that under the will of James Dangerfield the defendants A. E. Dangerfield and Richard Dangerfield took an estate in fee simple or other estate of inheritance in the lands in question, subject to the limited estate in favour of their mother, and that by virtue of the mortgage their children had been deprived of any estate or interest in the lands in question; they also asked for immediate possession, payment, and in default sale. The defendants A. E. Dangerfield and Richard

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Dangerfield admitted the making of the mortgage but denied the correctness of the amount claimed by the plaintiffs, and also contended that they were only life tenants of the lands in question. The defendant Lucy Dangerfield contended that her husband was only a life tenant, and that she had no estate or interest in the lands. The adult children contended that the mortgagors took as life tenants only, and the infant children submitted their rights to the protection of the Court.

The action was tried on the 27th of May, 1902, at Hamilton, before Lount, J., who on the 13th of August, 1902, gave judgment against the mortgagors in the usual form, but, it being unnecessary and improper in the learned Judge's view so to do, he refused to decide the question of title, leaving that question to be dealt with on the reference by the Master, and he dismissed the action with costs as against the children of the mortgagors.

The plaintiffs appealed, and the appeal was argued before a Divisional Court [BOYD, C., and FALCONBRIDGE, C.J., K.B.] on the 2nd of February, 1903.

James Bicknell, K.C., and *George C. Thomson*, for the appellants. It is necessary to have the question of title decided before the reference is proceeded with. All the parties to the action wish to have the question decided, and it is impossible for the Master to take the accounts or proceed with the sale until it is decided. Upon the true construction of the will in question the estate given to the sons of the testator is an estate of freehold, and the sons are tenants in common during their joint lives of the lands in question. Upon the death of either son the survivor has during his life an estate of freehold, provided the deceased brother has not left heirs of his body. If the son first dying does leave heirs of his body, they are entitled by implication to an estate tail in the lands as special occupants during the life of the surviving brother, and after the death of both brothers an estate of inheritance is given to the lawful heirs of both brothers. The rule in *Shelley's Case* is, therefore, applicable, because there is an estate of freehold given to each of the two sons, and there is an estate of freehold immediately given to the heirs of one son and an

ultimate remainder to the heirs of the other son. The direction for the sale of the land does not militate against this conclusion. That direction is repugnant to the absolute gift. Nor does the addition of the words "then surviving" alter the construction. Heirs must always survive the ancestor, and, therefore, the words "then surviving" are of no importance in deciding as to the estate taken.

W. Harold Barnum, for the adult defendants. The sons of the testator do not under this will take by virtue of the rule in *Shelley's Case* an estate in fee simple or an estate in fee tail. It is quite clear on a careful reading of the clause that the sons take an estate for life only, and that the ultimate remainder is in favour of the children of the brothers who may be living at the time of the death of the survivor of the two brothers. The land is to be sold at that time, and the proceeds are then to be divided among the heirs then surviving, that is, among the children then surviving of the two brothers. The words "lawful heirs" are evidently used as equivalent to "children," and not as a technical term conferring upon the sons of the testator by implication of law a larger estate than that intended to be given to them by the testator.

F. W. Harcourt, for the infant defendants in the same interest.

February 9. The judgment of the Court was delivered by BOYD, C.:—By the terms of the will a point of time is fixed for the sale of the land and distribution of the proceeds of sale. That is at the time when the life estate given to the two sons—to last as provided by the testator during the life of the longest liver of the two—has come to an end by the death of both sons. At that time the corpus of the land is to be sold and the proceeds of each share (*i.e.*, presumably a moiety) shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike. This plainly points to the ascertainment of the persons to share beneficially in the moneys arising from the sale at a time fixed as at (*i.e.*, after) the decease of both sons. Who then are found to be the lawful heirs of each son are entitled to one-half the proceeds to be divided among them, share and share alike. This is the

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plain meaning of the testator, and it has the effect of limiting the sons' estate to one for life or their joint lives, and to something less than an estate in fee or in tail. The nature of the estate under the mortgage will depend on the state of affairs as to family at the death of the son who first dies, but upon the death of both sons the corpus falls to be sold and divided as directed.

Having regard to *Evans v. Evans*, [1892] 2 Ch. 173, I would say that the estate given by the will in the land is to be defined as a life estate for the joint lives of the two sons, the first takers (subject to certain modifications that may arise on the death of one during the life of the survivor, which can now only be conjectural), with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest liver of the two sons.

The point to be noticed in reaching this conclusion is that the ultimate destination of the land when sold is not to those who are heirs of the first deceased son at the time of his death but those who are his heirs at the death of the son who dies second in order.

As to the costs. All costs of plaintiff should be paid by the mortgagors, defendants, up to hearing, and costs of those who were brought in on account of the question of construction should be borne either by themselves or by the mortgagors, as they did covenant for a title in fee simple—that has been the occasion of the extra expense—if their co-defendants so ask.

Costs in Master's office may be reserved to be disposed of by the Master on and after taking the accounts.

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[IN THE COURT OF APPEAL.]

FITZGERALD V. FITZGERALD.

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Jan. 26.

Dower—Equitable Estate—Voluntary Conveyance by Husband.

It is only when the husband dies beneficially entitled thereto that the wife acquires any right to dower in an equitable estate, and the husband can therefore deal as he pleases with such an estate, a voluntary conveyance thereof, even though made with an object of preventing the wife acquiring any right to dower, being unimpeachable by her.
Judgment of Falconbridge, C.J., K.B., affirmed.

APPEAL by the plaintiff from the judgment at the trial.

The plaintiff was the widow of one James W. Fitzgerald and brought the action against her stepson for a declaration that she was entitled to dower in certain land conveyed to the stepson by her husband about four years before his death. The claim to relief was put on two grounds; first, that there had been at the time of the marriage, and as an inducement to the plaintiff to consent thereto, a representation by the husband that he was the owner of the property in question, and a promise that he would give it to her; and second, that the conveyance to the plaintiff's stepson had been made for the express purpose of defeating the plaintiff's claim to dower and was colourable and void. At the time of marriage and down to and at the time of the impeached conveyance, the husband had only an equity of redemption in the property.

The action was tried at Peterborough before Falconbridge, C.J., K.B., who found all the facts in the plaintiff's favour, but, after consideration, gave judgment on the 7th of January, 1902, dismissing the action without costs.

The appeal was argued before ARMOUR, C.J.O., OSLER, MOSS, and GARROW, JJ.A., on the 10th of November, 1902.

Aylesworth, K.C., and J. W. Bennet, for the appellant. The learned Chief Justice has found that there was a promise by the appellant's deceased husband to give this property to the appellant. Even if that promise is not enforceable it at least puts the appellant in the position of a person having a claim against the deceased, and therefore with the right to attack his fraudulent and voluntary conveyance. When that

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is set aside the right to dower attaches, or it should be held that the husband died beneficially entitled, and therefore that the appellant's right arose: *Bateman v. Bateman* (1702), 2 Vern. 436. Apart from this there has been a fraud on the wife's rights. It is a well settled principle that a man has a right of action if he is defrauded of the rights which he expects to enjoy in his intended wife's property: *Strathmore v. Bowes* (1789), 1 Ves. Jr. 22, 1 W. & T. L. C., 7th ed., p. 613; *Palmer v. Neave* (1805), 11 Ves. 165. The same principle applies here. The intended husband represented that he was possessed of certain property, including that now in question, and the appellant's expectation of obtaining a right to dower in that property was one of the inducing causes of the marriage. The question could not have arisen in England, and there are no English authorities, but the American authorities are directly in point. See *Youngs v. Carter* (1877), 10 Hun 194; *Rabbitt v. Gaither* (1887), 67 Md. 94; *Petty v. Petty* (1843), 4 B. Monroe 215. The same question may, in another form, be treated as one of estoppel, for the intended husband has represented that he was and would continue to be the owner of the property: *Mills v. Fox* (1887), 37 Ch. D. 153; *Piggott v. Stratton* (1859), 1 DeG. F. & J. 33; *Hammersley v. De Biel* (1845), 12 Cl. & F. 45.

Watson, K.C., and *Edwards, K.C.*, for the respondent. This is really a very simple case, the true issue in which has been confused by the elaborate argument on behalf of the appellant. The appellant admittedly never had any right to dower, but a possibility to become a reality if the husband had chosen to hold the equity of redemption and had died seized thereof. He parted with the equity of redemption and that put an end even to the possibility: *Re Luckhardt* (1898), 29 O.R. 111. The conveyance was in fact made in good faith, but whether it was or was not is quite immaterial. The husband could do as he pleased, and a voluntary conveyance made with the avowed object of preventing the wife's possible right ripening into an actual interest could not be impeached. The promises and representations relied on are of the vaguest character, and clearly are not enforceable.

Aylesworth, in reply.

January 26. OSLER, J.A. :—The case was that when the plaintiff married her now deceased husband, she being then about sixteen and he about fifty-seven years of age, he was possessed of the equity of redemption in certain lands subject to two mortgages which he had created thereon. Some time afterwards the parties disagreed and the wife left her husband, and with the exception of a very short interval, they never lived together again. About four years before his death the husband conveyed his equity of redemption in these lands to the defendant, a son by a former marriage, for the expressed consideration of \$16,000, which was not in fact paid. There seems little reason to doubt that this conveyance was really made in order, if possible, to prevent the plaintiff from ever becoming entitled to dower in the land. It may be taken, so far as the relief sought in this action is concerned, to have been a mere gift to the defendant.

The question is, whether the plaintiff is entitled to say that, notwithstanding the conveyance, her husband died beneficially entitled to an equitable estate in respect of which she may be dowerable out of the land under the provisions of R.S.O. 1897, ch. 164, sec. 2.

The case was argued, as it seems to me, very much upon the assumption that by analogy to the wife's inchoate right to dower in the land in which the legal estate is in the husband, there is a similar inchoate right in respect of dower out of an equitable estate. There is no such analogy. In the one case there is the common law right, arising out of the marriage relation, of which the wife cannot be deprived by the voluntary act of the husband in alienating the land during their joint lifetime; in the other the wife has a mere chance or possibility of becoming dowerable, depending, under the statute, upon whether the husband does or does not die beneficially entitled to the land for such an estate or interest as is mentioned therein.

Bateman v. Bateman, 2 Vern. 436, has been cited. There, however, the husband died seized of the legal estate, and the defendant attempted to defeat the action of dower by setting up a secret declaration of trust made by the husband in his favour before the latter's marriage with the plaintiff. But the

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husband had always continued in the possession of the land and was so at the time of his death. The declaration was held (by Lord Keeper Nathan Wright) to be "a secret fraudulent deed of trust intended to deceive creditors and purchasers." There the wife had acquired by her marriage an inchoate right to dower unless in truth and in fact the husband was a trustee only for the defendant, and of this the husband could not by any act of his deprive her. The plaintiff was held entitled to impeach the secret trust and to shew that the legal estate remained in her husband unaffected thereby.

In our case on the contrary the wife had no interest—no estate—inchcate or otherwise, unless the husband had died beneficially entitled to an inheritable estate in possession. While he lived the estate or interest he had in the land was his own unaffected by any interest or estate of his wife. He was at liberty to sell or give it away as he pleased, even for the express purpose of defeating the wife's chance or possibility of becoming dowable in respect of it. She might, no doubt, have proved, if she could, that notwithstanding the deed there was a secret trust in favour of the grantor so that he still remained beneficially entitled. But the evidence seems to me reasonably clear that, beyond the right to maintenance provided for the father, the deed to his son, the defendant, was intended to be absolute and free from any other trust or reservation in his favour.

Fleury v. Pringle (1878), 26 Gr. 67; *Robertson v. Robertson* (1870), 25 Gr. 486; *Black v. Fountain* (1876), 23 Gr. 174; *Re Croskery* (1888), 16 O.R. 207; *Re Luckhardt*, 29 O.R. 111, may be referred to.

The appeal must therefore be dismissed.

GARROW, J.A.:—The plaintiff is the widow of the late James W. Fitzgerald, who died on the 11th of May, 1901, and she brings this action to have dower assigned to her out of certain lands in the town of Peterborough owned by her late husband, and to have a conveyance by her said late husband to his son by a former marriage, the defendant, dated 29th of June, 1897, of the said lands set aside, she alleging that such

conveyance was voluntary and was made for the purpose of defrauding the plaintiff of her dower in these lands.

The marriage took place on the 31st of July, 1884. At the time of the marriage the late James W. Fitzgerald was the owner of the lands in question, but subject to a mortgage of the fee simple, which mortgage was still subsisting, unpaid and undischarged, at the death of the said James W. Fitzgerald, who, therefore, at no time during the coverture with the plaintiff had anything more in the land in question than an equity of redemption. And it was this equity of redemption which he conveyed to the defendant in and by the conveyance which the plaintiff now seeks to set aside.

Although not apparently mentioned in the plaintiff's statement of claim, it appears in the evidence given at the trial that immediately before her marriage to her deceased husband, who was very much her senior, and apparently to overcome the objections by the plaintiff and her relations to the marriage on this ground, he orally promised that if she would marry him he would convey all his property, including, of course, the land in question, to her, and that upon the faith of this promise the marriage was finally agreed to. The plaintiff bore one child, a son, to the deceased, who had also several children by a prior marriage. The deceased by his will gave all his remaining property to the defendant, making no provision whatever for the plaintiff or for her son by him.

The learned Chief Justice found as facts that the late James W. Fitzgerald before the marriage with the plaintiff represented to her as an inducement to the marriage that he was the owner of the land in question and of other property, and also promised that if she would marry him he would give her everything that he owned, and that "it was no doubt perfectly well understood that the necessary effect of the transaction (*i.e.* the conveyance to the son) was to cut her out, and the intent to cut her out is the only proper inference. Many of the recognized landmarks of fraud are visible along the path travelled by the defendant and his father before, at, and after the making of the deed." And yet giving her the benefit of these findings in her favour he held it impossible to give her the relief asked, because the legal estate in the lands

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in question never was in the husband during the plaintiff's coverture, and the plaintiff, therefore, never had a right of dower, and he dismissed the action without costs.

An equity of redemption, such as the one in question, is at the highest an equitable estate; the legal estate is vested in the mortgagee.

Dower in equitable estates is now regulated by R.S.O. 1897, ch. 164, sec. 2, an enactment which was in force long before this marriage took place, and by its terms it is clear that to entitle the widow to dower in an equitable estate the husband must die beneficially entitled: *Re Luckhardt*, 29 O.R. 111.

The effect of this provision is to enable the husband to deal as he pleases with an equitable estate, without his wife's concurrence. She has no dower nor inchoate right of dower in land so held, and has therefore no status to complain if her husband chooses to sell or even to give away his lands so held. The only way in my opinion in which the alleged right could be made out in this case would be to hold that the conveyance to the defendant was a mere sham, and so intended by both parties, and that notwithstanding the conveyance the plaintiff's late husband still continued to be the beneficial owner when he died, but, while I would willingly aid the plaintiff if I could, I am not able to read the evidence in such a way as to reach this result. It is entirely probable, as the learned Chief Justice has found, that the object of the conveyance, or at least one object, was to prevent the plaintiff having or claiming dower in these lands, but such an object, however morally objectionable, was not, I think, obnoxious to the law, even if distinctly avowed, so long as the transaction was intended to be, as I think it was, a real one and not a mere empty sham.

Nor can the oral promise before marriage to give her these lands help. That of course is a promise made in consideration of marriage and so falling within the provisions of the Statute of Frauds, and confers no right of action legal or equitable (if there is now any distinction) to attack such a conveyance as the one in question, even assuming it to have been voluntary, or even made expressly to debar the plaintiff of her expected rights: *McAskie v. McCay* (1868), Ir. Rep. 2 Eq. 447, 16 W.R. 1187.

In my opinion the appeal must be dismissed, but under the circumstances I think without costs.

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MOSS, J.A., concurred.

ARMOUR, C.J.O., was appointed to the Supreme Court of Canada before the delivery of judgment.

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[MEREDITH, C.J.]

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Jan. 16.

BETWEEN THE RATHBUN COMPANY (LIMITED), OF DESERONTO,
AND
THE STANDARD CHEMICAL COMPANY (LIMITED), OF TORONTO.

Arbitration and Award—Stating Case—Matter “Arising in the Course of the Reference”—Revoking Submission—Arbitration Act—R.S.O. 1897, ch. 62, sec. 41.

Arbitrators were appointed under the arbitration clause in an agreement between two companies, whereby, *inter alia*, one agreed to provide the other daily with a certain quantity of cordwood, which the latter agreed to carbonize into charcoal, and to deliver to the former to the maximum quantity of 85,000 bushels *per* month. The arbitration clause provided that “in case of any dispute . . . arising between the parties in regard to the meaning or construction of this agreement . . . or of the mutual obligations of the parties . . . or of any other act, matter or thing relating to, or concerning the carrying out of the true spirit, intention, or meaning of these presents, the same shall be determined by arbitration.” Disputes arising between the parties, one of the claims referred to the arbitrators was for damages for alleged short delivery of charcoal, such shortage being claimed whatever the proper construction of the agreement in that regard. On application by one of the parties, under section 41 of the Arbitration Act, R. S. O. 1897, ch. 62, for a direction to the arbitrators to state a special case as to what was the true construction of the contract as to the amount of charcoal called for *per* month under it—a matter upon which they had reached and announced a conclusion:—

Held, that the claim referred to, leaving the proper construction of the agreement open, this was a question of law “arising in the course of the reference” within the meaning of the said section, and a special case might properly be directed as to it.

Held, also, that a special case having been directed as to this, the principal question, it might properly be made to include two other questions in dispute, though had they been the only questions which the applicants desired to have stated, it would not have been proper to direct the case as to them.

A party to a reference is not entitled *ex debito justitiæ* to have a special case directed whenever a question of law arises in the course of a reference.

This is a matter resting in the discretion of the Court.

There is no general rule that where the arbitrators are specially qualified to decide the question of law, this direction should not be given, at all events where the arbitrators have ruled upon the question.

Semble, that different considerations apply to the exercise of the discretion to give leave to revoke a submission (R.S.O. 1897, ch. 62, sec. 3), a discretion which is to be exercised only under exceptional circumstances.

THIS was an application by the Standard Chemical Company under the Arbitration Act, R.S.O. 1897, ch. 62, sec. 41, for a direction to the arbitrators to state a special case. The reference to arbitration was pursuant to a certain agreement of July 22nd, 1898, between the two companies, whereby the Rathbun Company, being the owners of buildings, machinery,

kilns, power and plant at Deseronto for the production of charcoal and the conversion of the smoke and fumes from wood into wood-alcohol and other products, contracted and agreed with the Standard Chemical Company for the sale of the smoke and fumes from wood and for the lease of premises, plant, and privileges, and for the supply of water, steam and power, etc. Amongst other provisions, the Rathbun Company covenanted with the Standard Chemical Company to find and provide at their own expense for daily use, Sundays excepted, a maximum of 66 cords of cordwood, of which not more than 30 per cent. should be soft wood, and the balance hardwood, all said wood to be cut at least four months before delivery; and the Standard Chemical Company agreed to take the wood from cars promptly and pile it direct in kilns or retorts, and to employ competent and satisfactory men to run the kilns and properly carbonize the wood into charcoal of suitable quality and without waste, and to carry off the smoke and fumes, and they were to be entitled to manufacture all by-products of charcoal and grey acetate of lime, paying for all labour in the carrying on of this work from the receiving of the wood until the charcoal was delivered to the Rathbun Company as in the agreement provided, and the Rathbun Company were to supply them with all water and steam for power necessary to carry on the manufacture except during temporary delays caused by any unavoidable stoppage; and the Standard Chemical Company agreed to make such expenditure in the enlargement of the refinery kilns and retort plant as might be necessary to ensure the production and delivery of charcoal from wood to be delivered by the vendors to the maximum quantity of 85,000 bushels (of 20lbs. per bushel) per month or such less quantity in the manner required for daily delivery to the Deseronto Iron Company under their agreement with the Rathbun Company, but the total expenditure, inclusive of \$7,200 agreed to be contributed by the latter company, was for the purposes of this agreement, approximated at \$30,000.

The 22nd clause provided "that in case of any dispute, disagreement or difference of opinion arising between the said parties in regard to the meaning or construction of this agreement, or of any part thereof, or of the mutual and respective

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obligations of the said parties, or of the subjects to be referred to arbitration as hereinafter mentioned, or of any other act, matter or thing relating to or concerning the carrying out of the true spirit, intention, and meaning of these presents, the same shall be determined by arbitration, one arbitrator to be appointed by each of the parties . . . and the said arbitrators, or the majority of them, shall determine the same, either in a summary manner after hearing the claims and contentions of the parties respectively and examining the premises, or by taking evidence, and they shall have all power necessary for such purposes, and shall have power over the costs of the arbitration, and the award of the arbitrators or a majority of them shall be final and binding on the parties."

The motion was argued before MEREDITH, C.J.C.P., on November 18th and 20th, 1902, in Weekly Court.

W. Laidlaw, K.C., and *J. Bicknell*, K.C., for the Standard Chemical Company, pointed out that the former practice in such cases, which was to apply for leave to revoke the submission, had been changed by legislation and the proper practice was now to apply to have a special case directed: 60 Vict., ch. 16, sec. 41 (O.); R.S.O. 1897, ch. 62, sec. 41; *In re Jenison*, and *Kakabeka Falls Land and Electric Company* (1898), 25 A.R. 361, 364; and contended that this was a proper case for the direction to be made, and that such a direction might be given either before or after the arbitrators had given their decision. They referred to *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131; *Kirk v. East and West India Dock Co.* (1887), 12 App. Cas. 738.

E. D. Armour, K.C., and *C. A. Masten*, for the Rathbun Company contended that the present application was only an indirect way of getting an appeal from the decision of the arbitrators on the points of law which they had been asked to decide and which had been argued before them; that one of the arbitrators had been selected as peculiarly competent to deal with the points of law, and that the questions in dispute were not questions "arising in the course of the reference" within the meaning of sec. 41. They referred to *James v. James* (1889) 23 Q.B.D. 12; *Gibbon v. Parker* (1862), 5

L.T.N.S. 584; *Adams v. Great Northern of Scotland R.W. Co.*, [1891] A.C. 32; *In re Gray, Laurier & Co. v. Boustead & Co.* (1892), 8 Times L.R. 703; *In re Knight and the Tabernacle Permanent Building Society*, [1892] 2 Q.B. 613; *Re An Arbitration between Nuttall v. The Lynton and Barnstaple R.W. Co.* (1899), 82 L.T.N.S. 17.

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Bicknell, in reply, contended that however skilled in matters of law arbitrators might be, the Court might require them to state a case after they had given their decision on such matters, the principle being that the law is to be a law of the land, and not that of the arbitrators.

January 16. MEREDITH, C.J.:— This is an application under sec. 41 of the Arbitration Act, R.S.O. ch. 62, by the Standard Chemical Company of Toronto, Limited, one of the parties to a voluntary reference to arbitration, for a direction to the arbitrators to state in the form of a special case for the opinion of the Court certain questions of law which have arisen, as they contend, in the course of the reference, within the meaning of that section.

The parties to the arbitration on the 22nd July, 1898, entered into an agreement which provides by its 22nd paragraph for a reference to arbitration of any dispute, disagreement or difference of opinion arising between the parties to it, in regard to its meaning or construction, or as to the mutual and respective obligations of the parties, or as to the subjects to be referred to arbitration, or "any other act, matter or thing relating to or concerning the carrying out of the true spirit, intention and meaning" of the agreement.

Disputes, disagreements and differences did arise between the parties, and on April 17th, 1901, the applicants gave to the Rathbun Company notice that they admitted their obligation to take the cordwood mentioned in the agreement from the cars and to employ competent men to operate the kilns and properly carbonize the cordwood into charcoal of suitable quality and without waste, and to deliver the charcoal produced to the Rathbun Company, and that the applicants alleged that they had done so.

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The notice then, referring, as it says, to the claims against the applicants by the Rathbun Company for alleged shortage in the delivery of charcoal under the agreement, states that the applicants dispute that claim.

Then referring to the 22nd paragraph of the agreement, notice is given that the applicants invoke the provisions of that paragraph "for the determination of the said claim of the Rathbun Company Limited for alleged shortage of the delivery of charcoal produced, or which ought to have been produced, from the said wood," and that the applicants appoint an arbitrator "to hear and determine the said claim of the Rathbun Company Limited," and require the Rathbun Company to appoint its arbitrator.

How and when the claim to which this notice refers was made by the Rathbun Company does not appear.

On May 2nd, 1901, the Rathbun Company gave to the applicants notice of certain alleged breaches by them of the agreement, and of the intention of the Rathbun Company to avail itself of the powers given to it by the 20th paragraph of the agreement to take possession of the works and premises of the applicants.

The breaches alleged are that the applicants had failed to manufacture as agreed by them and to carry out the provisions of the agreement according to the spirit, true intent and meaning of it;

(1) In not delivering to the Rathbun Company pursuant to the agreement "a quantity of charcoal to the extent of 85,000 bushels of 20 pounds to the bushel per month in order that the Rathbun Company might deliver the same to the Deseronto Iron Company ;

(2) In burning a quantity of about 300 cords of wood out of the wood delivered and kept in store and reserve for the purposes of the agreement over and above the maximum quantity of sixty-six cords per day, except Sundays, provided for by the agreement ;"

"Whereby," as the notice reads, "you, the Standard Chemical Company, of Toronto, Limited, are in default both as to proportionate yield of charcoal and as to gross quantity to be delivered."

On May 3rd, 1901, the applicants gave to the Rathbun Company a notice in which they denied that they had failed to manufacture and deliver the charcoal according to the spirit, true intent and meaning of the agreement, disputed the right of the Rathbun Company to take possession, invoked the provision of the agreement for a reference to arbitration, and appointed an arbitrator "to determine the question whether the Rathbun Company is entitled to enter into possession of the said premises in pursuance of the said notice," and required the Rathbun Company to appoint its arbitrator.

On July 10th, 1901, the Rathbun Company gave to the applicants notice that the latter had not delivered the full quantity of charcoal which they had agreed by their contract to deliver, namely, 85,000 bushels of 20 pounds per bushel, per month ;

That the applicants had used more wood than they were entitled to use under the contract ;

That the applicants had not used soft wood in as large a quantity or proportion as is provided by the contract ;

That the applicants had not received the wood in accordance with their obligations under the contract, and that in consequence the Rathbun Company had been put to expense in unloading and piling it ;

That the Rathbun Company claimed that it was entitled to receive and that the applicants were bound to deliver the 85,000 bushels, of 20 pounds per bushel, per month, and that the Rathbun Company claimed compensation in damages for the shortage in delivery of charcoal ;

That the applicants were not entitled to use more than a quantity of wood equal to 66 cords per day, Sundays excepted, and the Rathbun Company claimed compensation or damages for the use of the excess in quantity that was used, and that the applicants were bound to use the proportion of soft wood mentioned in the contract, and compensation or damages for the use of soft wood in less quantities and proportions than provided for by the contract ;

That thereafter the proper quantities of wood per day or per month and proportions of hard and soft wood should be adhered to and maintained by the applicants ;

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And that the Rathbun Company claimed that the applicants had failed to manufacture as agreed and to carry out the provisions of the agreement according to the spirit, true intent and meaning of the delivery of the charcoal for the Deseronto Iron Company, and had burned more wood than the applicants were entitled to use, and that such failure, default and wrongful burning continued and occurred for more than fifteen days before the giving of the notice of taking possession by the Rathbun Company, dated May 2nd, 1901, whereby the Rathbun Company were entitled to possession of the works, pursuant to the terms of the contract ;

And that the Rathbun Company thereby appointed its arbitrator "to hear and determine the said claim of the Rathbun Company."

By an instrument executed by both parties, dated October 18th, 1901, addressed to the arbitrators appointed by them respectively, and to Christopher Robinson, Esquire, K.C., who was thereby appointed the third arbitrator, (his appointment being expressed to be made by the parties, to determine the questions submitted by and in pursuance of the notices of April 17th, 1901, May 3rd, 1901, and July 10th, 1901, already referred to), the applicants confirmed the appointment made by them of their arbitrator "for the determination of the said questions," and the Rathbun Company confirmed the appointment made by it of its arbitrator "for the determination of the said questions"; and the parties agreed that all of the questions referred should be determined as one reference, and that one award should be made therein.

The applicants during the course of the reference applied to the arbitrators to state a case under sec. 41 of the Arbitration Act, R.S.O. 1897, c. 62, as to various questions which were in dispute, and the arbitrators having declined to state a case as to some, at all events, of the questions as to which they had reached a conclusion and announced it, this application was made.

Upon the argument, I expressed the opinion that as to certain of the questions no direction should be given, and as to the others I reserved my decision.

The questions reserved for decision were :

(1) Whether upon the true construction of the contract the applicants were for the sixty-six cords of wood delivered daily, Sundays excepted, bound to deliver 85,000 bushels (of twenty pounds to the bushel) of charcoal per month, or whether delivery of what was, or might have been with proper care and skill and without waste, produced from the wood, though less than 85,000 bushels per month, was a compliance with the terms of the contract.

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(2) Whether there had been a breach of the agreement on the part of the applicants which entitled the Rathbun Company to take possession of the works.

The answer to the first question might and probably would affect the determination of the second question ;

(3) Whether the claim of the Rathbun Company for the use of more wood than sixty-six cords per day was properly the subject of a reference to arbitration under the provisions of paragraph 22 of the agreement.

It was objected by counsel for the Rathbun Company

(1) That the dispute as to the construction of the contract was a question specifically referred, and that sec. 41 was inapplicable because, as it was argued, the question was not therefore one "arising in the course of the reference" within the meaning of the section ;

(2) That the applicants were precluded by the course taken by them on the reference from invoking the aid of the Court under sec. 41 ;

(3) That at all events as a matter of discretion the direction asked for ought not to be made.

As to the first objection, I was upon the argument very much impressed by the contention of Mr. Armour that it would be anomalous, and was not contemplated by the Legislature, that where parties had agreed to refer a specific question, such as the true construction of the agreement which has arisen in this case, to arbitration, either of them should be at liberty at the outset of the proceedings to call upon the arbitrators to state in the form of a special case for the opinion of the Court the very question of law which the parties had deliberately chosen to submit for their arbitrament, and that the questions which it was intended might be so stated were such as arose

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1903 reference was of all matters in dispute between the parties, and
THE in the course of the reference it became necessary for the
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v. true construction was.

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Upon further consideration, I have come to the conclusion that the objection is not well founded. Owing to the way in which the reference to the arbitrators has been effected, it is necessary to spell out from the various documents by which it was completed the subject matter of the reference, and as I understand the effect of these documents, one of the claims of the Rathbun Company, and the principal one, is that the applicants have not delivered the quantity of charcoal which, under the terms of the agreement, it was their duty to deliver, and to recover damages for that breach.

The Rathbun Company does not rest this claim solely upon the construction of the contract for which they contend, but while taking the position that that construction is the right one, they also claim that even if the contention of the applicants as to the meaning of the contract is right, there has been a shortage in the delivery of charcoal for which they are entitled to recover damages from the applicants.

The claim which is by the notice of the applicants of April 17th, 1901, referred to arbitration, is the claim of the Rathbun Company "for alleged shortage of the delivery of charcoal produced, or which ought to have been produced, from the said wood."

The claim as to this branch of the case, which is by the Rathbun Company's notice of July 10th, 1901, referred, is that the Rathbun Company was entitled to receive, and that the applicants were bound to deliver, 85,000 bushels of charcoal of twenty pounds per bushel, per month, and compensation or damages for the shortage in delivery of charcoal.

I do not read this as meaning that the question of the obligation of the applicants to deliver 85,000 bushels of charcoal irrespective of what they had or might have produced from the daily supply of sixty-six cords of wood was specifically referred, but as being a reference of the claim of the Rathbun Company for damages for short delivery of the charcoal, a

shortage being claimed, whatever view may be taken as to the meaning of the agreement.

I think, therefore, that this question was one arising in the course of the reference within the meaning of sec. 41.

It is in this view unnecessary to express an opinion as to whether or not the meaning of the words "arising in the course of the reference" is that for which counsel for the Rathbun Company contended.

As to the second question, it is not open to question that much was done by counsel for the applicants in the course of the proceedings before the arbitrators to lead to the conclusion that they did not desire that a case should be stated by the arbitrators, but were content to leave to them the determination of all the questions in dispute, including that as to the construction of the agreement, without asking or requiring the arbitrators to seek the advice of the Court as to that or any other matter of law, which they were called upon to decide. It does appear, however, that Mr. Laidlaw, who acted as counsel for the applicants before the arbitrators, at a comparatively early stage of the proceedings,—at what stage exactly does not appear,—gave notice that after the evidence had been taken he would apply to the arbitrators to state a case for the opinion of the Court, and that application he did make later on with the result I have already mentioned.

I have doubted whether, in view of these circumstances, it is now open to the applicants to obtain a direction to the arbitrators under the statute, but I have come to the conclusion that, having regard to the very large amount at stake and the fact that the agreement had several years to run, and that the construction which the arbitrators put upon it will conclude the applicants not only as to the damages now claimed but as to future operations under the agreement in the years for which it has to run, and also to what I cannot help thinking is a serious question as to the correctness of the interpretation which the arbitrators have put upon the contract, I ought not to refuse the application if it is otherwise well founded.

If it was proper to direct the arbitrators to state a case where the parties had agreed in writing not to require, or apply to the Court to require, the arbitrator to state in the form of a

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special case for the opinion of the Court any question of law arising in the course of the reference but that such question should be determined by the arbitrator, it would seem that *a fortiori* what happened in this case should not bar the right of the applicants, if otherwise entitled to do so, to require a question of law to be referred under the section. Arbitrators were directed to state questions of law where the agreement contained such a provision as I have mentioned, by Mr. Justice Mathew, in *In re Hansloh and Reinhold, Pinner & Co.* (1895), 1 Com. Cas. 215, and I think I may safely follow where that distinguished Judge has led.

Mr. Armour also relied upon the fact that actions had been brought by the Rathbun Company to restrain the applicants from proceeding under their notices to arbitrate, and that the motions for injunction to that end were resisted by the applicants. The object of these actions, it was said, was to have the construction of the contract determined by the Court, and it was urged that having prevented that being done and having insisted upon the method of determining the questions in dispute being by arbitration, the applicants ought not now to be allowed to avail themselves of the provisions of sec. 41.

The answer to this contention is, I think, that one of the incidents of an arbitration is or may be the stating of questions of law for the opinion of the Court either of the arbitrators' own motion or when they are directed by the Court to do so, and it may well be that the applicants preferred, as they had a right to do, to have their disputes settled by arbitration with the opportunity, if a proper case was made for that being done, of having the arbitrators advised by the Court upon any question of law that might arise in the course of the reference, to having the disputes, including questions of fact and assessment of damages, dealt with in an action.

There remains to be considered the question whether the case is one in which in the exercise of its discretion the Court should give the direction asked for.

That a party to a reference is not entitled *ex debito justitiæ* to have the direction given whenever a question of law has arisen in the course of the reference, is, I think, clear. The matter is one resting in the discretion of the Court, and no hard

and fast rule can be laid down as to when the discretion should and when it should not be exercised in favour of giving the direction, but each case must depend upon its own facts and circumstances.

Re Nuttall and Lynton and Barnstaple R.W. Co., 82 L.T. 17, was referred to by Mr. Armour as authority for the proposition for which he contended, that where the arbitrators are specially qualified to decide the question of law, the discretion should not be exercised in favour of giving the direction, but I do not understand that any such general proposition is laid down. It is true that Lord Justice Collins says, at page 20, "I think that the decisions have gone to this length, that if the Court is satisfied that there is a real point of law, and that the arbitrator is not specially qualified to decide that point, the Court will order the arbitrator to state a special case under sec. 19 of the Act."

There is nothing in the judgments of Lord Justice Smith and Lord Justice Williams indicating that either of them thought that the fact that the arbitrator was specially qualified to decide the question of law was sufficient to preclude a party to the reference from obtaining a direction under the section; all that was decided was that the giving of the direction was a matter resting in the discretion of the Court, and that in the circumstances of that case it was proper to give it.

The fact that an arbitrator is specially qualified to decide the question of law is a circumstance which, taken in connection with other circumstances, may affect the exercise of the discretion, and it may be that as a general rule, as a matter of discretion, where the arbitrator is so qualified and has not dealt with the question, or there is no reason to think that he will decide it erroneously, the direction ought not to be given. It was, I think, to such a case as this that Lord Justice Collins referred in the passage which I have quoted from his judgment, and the case he was dealing with, as the Court treated the application (the parties having agreed to that) as if it had been made while the reference was proceeding, was a case of that kind.

I can see no reason why such a rule should be applied where the arbitrator has ruled upon the question of law, or is about to do so, and it is open to serious question whether his

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actual or intended ruling is right, or why the exercise of the discretion in such a case should depend upon whether the arbitrator is or is not specially qualified to decide the question of law.

The object of sec. 19 of the English Act, which is the same as our sec. 41, is discussed in *The Tabernacle Permanent Building Society and Knight*, [1892] A.C. 298, and I refer particularly to what is said by the Lord Chancellor at pp. 301-2.

After pointing out that where during the progress of an arbitration it was seen that the arbitrator had mistaken the law and was about to act upon his error, the power of putting him right used to consist in the right of either party to revoke the submission to arbitration, and that that power had been greatly controlled by legislation, so that it may be extremely difficult for a party to make such a case to a Court as will induce it to make an order giving leave to revoke unless a case is stated, he goes on to say that this is obviously a clumsy and incomplete remedy, and that the Court ought to have in its own hands power to compel in a fit case a reference to a Court of competent jurisdiction so as to prevent a failure of justice (page 301). I understand him to mean that the purpose of the section was to give that power to the Court, and this he makes clear, I think, by what is said afterwards on page 302: "I think the object of sec. 19 . . . was rather to hold a control over the arbitration while it was proceeding by the Courts and not to allow the parties to be concluded by the award when, as it is said, parties may be precluded by the arbitrator's bad law once the award is made. . . ."

In *James v. James*, 23 Q.B.D. 12, relied on by Mr. Armour as supporting his second and third objections, the application was for leave to revoke the submission, and leave was refused. The submission provided that the arbitrator might deal with the question of liability before dealing with the question of damages, and the parties had agreed that he should do this, and he had done it and decided the question of liability. The leave appears to have been refused because of the agreement that the arbitrator's decision on the question of liability should be a final decision, and in the view of Lord Justice Lindley it was not quite consistent with good faith that having done so

he should, after the decision had been given, seek to revoke the submission.

That case is, I think, distinguishable from the present. The application was to the Court to exercise the discretion vested in it by the statute, Imp. 3 & 4 Will. IV., ch. 42, sec. 39, and if granted would have resulted in the revocation of the submission and the putting an end to the arbitration, while in this case the result of the application being granted will be that the arbitrators will have the benefit of the opinion of the Court on the questions of law presented for their decision. The reference is not otherwise interfered with, and the arbitrators remain the ultimate judges and their award will be final. In that case on the particular facts of it, the Court decided that a case had not been made for the exercise of its discretion to give leave to revoke the submission. Different considerations, in my opinion, apply to the exercise of the discretion to give leave to revoke a submission to arbitration from those which are to be applied in exercising the discretion to direct the arbitrators to state a case under the provisions of sec. 41. The one discretion is to be exercised only under exceptional—perhaps very exceptional—circumstances; the other is a new discretion which was intended to be and ought to be exercised whenever it is necessary to exercise it to prevent grave injustice being done to one of the parties to an arbitration.

My view is, I think, in accordance with the opinions of the Master of the Rolls and Lord Justice Chitty in *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131, where the effect of sec. 19 of the English Act is discussed, and it is pointed out that it gives the Court very extensive powers beyond any which the Court previously possessed; and I am supported also by the opinion of the present Lord Chancellor, to which I have referred.

Under all the circumstances, I have come to the conclusion that my discretion should be exercised in favour of granting the application as to the questions as to which I reserved judgment.

My reasons for taking this course are, in addition to what I have just said, and those which I have given in dealing with the second objection to the application, that in my opinion in addition to the question of the interpretation of the contract

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being a substantial and a very important one, it is open to serious question whether the arbitrators have not erred in the interpretation which they have placed upon it.

There is some question as to whether the arbitrators have ruled upon the second and third questions. Mr. Armour contended that they have, but if they have not done so, and if, had they been the only questions which the applicants desired to have stated, I ought not to direct a case to be stated for the reasons mentioned in the *Nuttall* case, I think that I may properly direct them to be stated, as I have decided that the other and principal question should be stated.

An order will therefore issue directing the arbitrators to state in the form of a special case the three questions.

I refer to *In re Richmond Gas Co. and Mayor, etc., of Richmond* (1892), 62 L.J. Q.B. 172, for the form of a case stated under sec. 19 of the English Act.

I make no order as to costs, but leave them to be dealt with by the arbitrators: *In re Knight and The Tabernacle Permanent and Building Society*, [1891] 2 Q.B. 63.

A. H. F. L.

[IN THE COURT OF APPEAL.]

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Railways—Negligence—Signals—Interlocker—Contributory Negligence—Orders to Engine Drivers—Workmen's Compensation Act—R.S.O. 1897, ch. 166.

The defendants were erecting an interlocking apparatus at a point of their main line where there was a siding, whereby the switch could be worked and a signal shewn to indicate how it was set, by lowering the upper or lower arm of the signal as the case might be. The plaintiff's husband, an experienced engine driver in defendants' employ, having been informed before starting with his train that the apparatus was in working order and that all trains were to be governed by the rules applicable in such cases, approaching the spot, saw the signal with both arms down, intimating that the interlocker was out of order, but nevertheless proceeded, and the switch not being fastened in any way the train was derailed and he was killed. As a matter of fact, the apparatus was not in working order, a switchman of the defendants being at the spot with flag signals to use in case of necessity, but he failed to warn the deceased. The defendants' rules governing engine drivers provided that they should stop when in doubt as to the meaning of a signal, also that a signal imperfectly displayed must be regarded as a danger signal, and that in case of doubt they were to take the safe course and run no risk. Employees were also specially instructed that if an interlocker was out of order trains were to be flagged through.

The plaintiff brought this action for damages under R.S.O. 1897, ch. 166 :—

Held, that although there was a plain defect in the condition of the way which was the cause of the derailment of the engine, the plaintiff was properly nonsuited, in that her husband, had he survived, could not have maintained an action, having negligently disobeyed his orders as contained in the rules, by proceeding with his train in spite of the condition of the signals.

THIS was an appeal by the plaintiff from the judgment at the trial of this action, which was brought by the widow and administratrix of Walter Holden, an engine driver of the defendants, under R. S. O. 1897, ch. 166, commonly known as Lord Campbell's Act, to recover damages for her husband's death, caused under the circumstances set out in the judgment.

The appeal was argued on September 19th and 22nd, 1902, before MOSS, OSLER, MACLENNAN, and GARROW, J.J.A.

Lynch-Staunton, K. C., for the appellant,* contended that the primary cause of the accident was the condition of the switch, or in the switchman not warning the deceased; that

* A great part of the argument turned upon the ground of defence founded on the plaintiff having accepted the insurance money paid to her by the Grand Trunk Railway Insurance and Provident Society. The appeal, however, was decided upon other grounds, and this portion of the argument is therefore not reported.

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the defendants were responsible for the negligence of not having the switch in order; that there was no negligence in disregarding a dead signal; that the deceased was right in going through when the signals were down, not being flagged to the contrary; that the switchman himself did not think the train should have stopped, and that the natural conclusion of the siding signal being down would be that the train might be thrown on the wrong track, not that it might be thrown off the track: *Rombough v. Balch* (1900), 27 A. R. 32, 378; *Halifax Electric Tramway Co. v. Inglis* (1900), 30 S.C.R. 256.

W. Cassels, K.C., and *W. Nesbitt*, K.C., contended that the deceased ran into danger through his own fault; and that the signals not being in place was notice to him to stop the engine, according to the governing rules, unless flagged through.

January 26. The judgment of the Court was delivered by OSLER, J.A.:—Appeal by the plaintiff from the judgment at the trial.

The case was tried before Falconbridge, C.J.K.B., and a jury at Hamilton. The plaintiff was nonsuited. She sues as widow and administratrix of Walter Holden, deceased, a servant of the defendants, who lost his life by reason, as it is said, of their negligence.

The deceased was the engine driver on a passenger train which left Hamilton for Barrie on the afternoon of October 27th, 1900.

A short distance east of Hamilton is the Toronto, Hamilton and Buffalo Railway crossing of defendants' line, at which place there is also a switch for a siding from defendants' main line running up to the works of a smelting company, and owing to the points at the switch not having been securely fixed or set for the main line, the engine of the train was derailed and thrown off the track and down an embankment at that place, and the driver was killed. There is no doubt that in consequence of some one's neglect the points were not fastened as they ought to have been, and that this was the cause of the engine leaving the track.

The defendants contended that the accident would not have happened but for the deceased's disobedience of orders and his

own neglect and want of caution in the management of his train. A further defence of a different character was also relied upon.

The learned trial Judge was of opinion that the accident was directly caused by neglect and disobedience of orders on the part of the deceased. The action was accordingly dismissed, it being arranged with the assent of the learned Judge and of counsel for the parties that if the Court above should be of opinion that there was on the case as a whole any evidence proper to be submitted to the jury of negligence on the part of the defendants which would justify a finding for the plaintiff, judgment should be entered for such damages as the jury might assess. The question of damages was therefore the only question submitted, and these were assessed at the sum of \$3,060. The amount is not in question, as there was evidence that the yearly earnings of the deceased in the particular employment in which he was engaged at the time of his death had been about \$1,020 per annum for the preceding three years. Before formally disposing of the case, the learned trial Judge heard the evidence on the other branch of the defence without a jury, and finding that such defence was also proved, dismissed the action on both grounds.

Dealing with the first branch of the case, the evidence was that in June, 1900, an order was made by the Railway Committee approving of a crossing at rail level by the Toronto, Hamilton and Buffalo Railway of the North and North-Western division of the defendants' railway at the place already referred to, on condition that an interlocking, derailing and signal system and all necessary works and appliances for properly operating the same should be constructed and operated there. Between that time and October 27th these works were constructed, probably during the week preceding the latter date. Briefly stated, the object of the system is by means of a mechanical device operated by rods connected with signals and switch points, and moved by levers handled by workmen in a tower or cabin at some distance from the rails to move or shift and lock securely the points of the switch, and at the same time to display the signals which are to guide the engine drivers in the management of their trains, indicating whether

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the switch or the main line is open, or whether the train is to stop before coming to the switch. The necessity for spiking the switch or fastening it by some device worked by hand is thus obviated, as well as, what is quite as important, the danger of conflicting signals. The signals operated by the "inter-locker," as it is called, are known as the distant and the home signals. Both consist of a movable arm or arms on a semaphore post, which for the former is placed about 1,750 feet from the switch, and for the latter about 500 feet therefrom. The distant has one arm, the home two, one of which (the upper) is attached to the post itself and refers to the main line; the other, which is attached to a bracket fastened to the post, refers to the siding or diverging track. The normal position of all is horizontal, *i.e.*, at right angles to the post, and in that position they are on the distant semaphore a cautionary or danger signal, and on the home a stop signal. When the distant signal is lowered the engineer may take his train past it without stopping, which being done, it is directly put to danger again, but he must not attempt to pass the home signal until it shews safety, *i.e.*, by being lowered to an angle of 60° from the horizontal. If the upper arm of the home semaphore is lowered, it informs him that the main line is open; but if the arm lowered is that on the bracket, it warns him that the siding is open and the main line closed. While, therefore, the home signals may both be up, they cannot, if the interlocker is in working order, both be down at the same time, as they would in that case be conflicting signals—one shewing safety for the main line and the other shewing safety for the siding or diverging line, two conditions which are inconsistent. On the evening of October 26th the work of the Canada Switch Company, by whom the interlocking apparatus was constructed and put in, was approved by the Government engineer, and reported by the defendants' signal-engineer as ready to be operated, and an order was on the morning of October 27th posted in the defendants' offices, and notified to conductors and engineers, that after seven o'clock a.m. on that day interlocking signals and derailing appliances at the Toronto, Hamilton and Buffalo Railway crossing, two and a half miles north of Hamilton, would be in working order, and that all trains would be

governed by rules governing interlocking and derailing appliances. It was proved that this order was known to the deceased before he took out his train on the afternoon of that day; that he was an experienced man, and had been for many years in the defendants' service, and that the interlocking system had for some time been in use in one, if not two, other places on that part of the line included in his usual run.

On the same morning the defendants sent a switchman named Jack to take charge of the interlocker. On going there he found the Switch Company's men still at work upon it, and they so continued all day. During that day Jack did not take charge of or work it at all, nor for anything that appears did he attempt to interfere with or manage the switch, or give notice to or communicate with his superiors as to the condition in which he found the interlocker, although he remained at or about the switch all day, and was provided with flag signals to use in case of necessity.

The normal condition of the points is that they are set for the main line, and are not opened for the siding unless the latter is being used for the purpose of the smelting company, into whose works it runs. The evidence is that the switch had been opened for that purpose in the afternoon, and the points then set back for the main line by the Switch Company's men, and that this was its condition as the engine approached the switch. Jack seems to have known this, but he called to the men to let him know if there was anything the matter so that he would have time to stop the train. They called in reply that it was all right. As the engine struck or passed over the points it jarred or displaced the switch in some way, and the result was that the engine was derailed and thrown down the embankment and the driver was killed. It was found that the switch was not connected with the switch rod of the interlocker, and that it had not been spiked or fastened in any way. The distant signal was down at the time, and so were both the home signals, and they had been so from the time the switchman came on in the morning.

The evidence leaves it in some uncertainty whether they were or were not in order when the train came in in the morning, but at that time the order was not known to the deceased.

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Jack seems to have been satisfied that it was safe to let the train come on, as he made no attempt to flag or otherwise notify or warn the engineer.

No. 7 of the rules or instructions for working the interlocker provides that in case of the plant being out of order, all switches or derails must be spiked over and the signals kept at danger, the train being flagged through the limits of the crossing.

Some of the rules governing the conduct of the engineer are the following:—

“Rule 2. In addition to these rules, the time tables will contain special instructions as the same may be found necessary.

Rule 59. (Referring to enginememen.) They must obey all signals given, even if they think such signals are unnecessary. When in doubt as to the meaning of a signal they must stop and ascertain the cause, and if a wrong signal is shewn they must report the fact to their conductor.

Rule 60. They must always keep a sharp lookout ahead, noting carefully the position of switches, semaphores and other signals, etc.

Rule 187. A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shewn, must be regarded as a danger signal, etc.

Rule 233. In all cases of doubt and uncertainty take the safe course and run no risks.”

On the “employees’” time table, under the headings, “Special instructions” and “Rules governing the use of signals,” is the following: “When the interlocker is out of order, trains may be flagged through the limits of the interlocker by the signalman.”

The plaintiff’s case is that the proximate cause of the accident was the negligence of the defendants in not having the switch points spiked over or otherwise properly secured. The defendants, while not denying that they were not in fact secured as they ought to have been, contend that the accident is to be attributed to the unfortunate engineer’s own breach of duty in neglecting rules of the company which he was bound to observe, and running his train on to the crossing when the

signals were in such a condition as to be a warning to him not to proceed with his train until he was signalled that the line was safe.

There would, in my opinion, be no difficulty in holding that if the signals displayed had been such as to have warranted the deceased in running through the crossing, or if the signalman had flagged him to proceed, there was ample evidence of negligence in the condition of the switch to have justified a verdict for the plaintiff under the 1st sub-section of section 3 of the Workmans Compensation Act, R.S.O. 1897, ch. 160. There was a plain defect in the condition of the way, which was the immediate cause of the derailment of the engine.

In actions of this nature, however, under the Fatal Accidents Act, R.S.O. 1897, ch. 166, the plaintiff, as administratrix of the deceased, can recover only if the deceased could himself, had he lived, have maintained an action against the defendants for the alleged negligence: *Senior v. Ward* (1859), 1 E. & E. 385. And if the injury happened in consequence of the deceased's own neglect of orders or other breach of duty, it is clear that had it been one falling short of causing his death, he could not have sued, being himself the author of the wrong he complained of.

It appears to me that this is one of the plaintiff's difficulties in the present case.

The rules under which the deceased was working, and to which he was bound to conform at the time of the accident, were those which came into force and were relative to the order he had received on October 27th in respect of the new signal system. He had no right to pass the home signals unless the main line was clear. Necessarily, he had to observe or take notice of both these signals. If both arms of the semaphore were down, they conveyed no intimation to him except that the signals were inconsistent, and therefore that from some cause or other the interlocker was out of order or not working properly. He could not regard the main line signal as a safety signal, because the siding signal as displayed was inconsistent with it, and the evidence is all one way that these signals as they stood were inconsistent and imperfectly displayed. Rules 59, 60, 187, and 233, and the rule cited from

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his time table, map out the clear and simple course he should have taken in such circumstances. It has not been contended that in the absence of signals of some kind shewing safety for the main line he was right in proceeding to the switch. Except these imperfect signals, he received none, as the signalman displayed none and did not flag him through, which was the alternative he should have looked for before he went through. It was urged by Mr. Staunton that he was justified in inferring safety from the fact that the signal for the main line was down, and that the man standing near, whom he might have seen was a signalman, did not warn him of danger or give a signal of any kind; but if the rule requires, as it does, that he should be signalled or flagged through the switch, if the semaphore signals are imperfectly displayed, I do not see how the omission to signal at all relieves him of the imputation of neglect of orders in proceeding without being signalled.

It is said that the fact of the signal or tower man not having taken charge of the interlocker because of the Switch Company having for some unexplained reason continued to work at it, makes a difference, but I do not think so. The deceased did not know that. The orders under which he was working required him to act as if the new system was in operation, and had he done so the accident would probably not have happened. To him the only information conveyed by the facts was that the interlocker was not in order, and the proper course to be adopted in that case was defined for him by the rules.

I am, therefore, of opinion, for the reasons I have stated, that the action was properly dismissed.

It is unnecessary to consider the other ground of defence arising out of the plaintiff's acceptance of the insurance money paid to her by the Grand Trunk Railway Insurance and Provident Society.

A. H. F. L.

[DIVISIONAL COURT.]

LUDLOW V. BATSON.

Defamation—Special Damage—What Constitutes.

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The special damage required in an action of defamation must be such as would be the reasonable and natural result of the words used.

Where, therefore, the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece from her father's estate, had put in a fictitious account for trifling matters, such as for candies, oranges, etc., and obtained payment of it, the special damage alleged being that in consequence the niece and his wife had left him and refused to live with him :—

Held, that such damage was not recognizable at law, not being the natural and reasonable consequence of the words used.

THIS was an action for slander tried before Street, J., at Brantford.

One Olive Batson, niece of the plaintiff's wife, whose parents had died when she was quite young, had lived with the plaintiff and his wife for twelve years; the plaintiff receiving an allowance for her board from her father's executors of from \$2.50 to \$3 per week. The defendant was a brother of Olive Batson, and the words complained of were that the defendant said that the plaintiff put in an account to William Campbell (one of the executors) for candies, oranges, and Sunday school collections. The innuendo charged in the statement of claim was that the plaintiff had made up a fictitious account, and by false pretences obtained payment of the same from Campbell, and was therefore guilty of an indictable offence.

The plaintiff's counsel admitted that the words were not actionable *per se*, but contended that they were so on proof of special damage.

The special damage alleged was that Olive Batson ceased to board with the plaintiff, and his wife had left him and refused to live with him.

The learned Judge was of the opinion that no such special damage was proved as would render the words actionable; and he dismissed the action, and ordered judgment to be entered for the defendants with costs.

From this judgment the plaintiff appealed.

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On December 8th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and BRITTON, J., the appeal was argued.

Brewster, K.C., for the appellants.

Harley, K.C., for the respondent.

January 19. FALCONBRIDGE, C.J.:—It was manifest on the evidence that the words were not capable of the meaning charged, and the plaintiff's counsel so admitted, saying: "I do not contend that they were actionable *per se*; but what I do contend is that any words are actionable if he can prove special damage."

The real innuendo, if any, would be that the plaintiff, being paid for Olive Batson's board, under the order of Court, was guilty of a mean or contemptible action in seeking to put in an account for trifling items of outlay such as those mentioned.

The plaintiff's counsel took his stand on the broad ground that any words are actionable if the plaintiff can prove special damage, and the special damage charged was that the plaintiff's wife left him because of these statements made by the defendant.

The plaintiff's counsel made attempts to prove that she left him for this reason, by the evidence of the husband, which evidence was promptly and properly rejected by the learned Judge as being mere hearsay, and therefore inadmissible. Then the plaintiff offered to call the wife to prove this fact; and for the purposes of this motion we must assume that, if called, she would have given evidence accordingly.

The learned trial Judge held that the words sworn to were not actionable, even if the special damage alleged were proved; and he dismissed the action, and ordered judgment to be entered for the defendant with costs.

The doctrine that any words are actionable by which the party has a special damage, is stated by Heath, J., in 1807, in *Moore v. Meagher* (1807), 1 Taunt. 38, at p. 44:—

"All words, if published falsely and without lawful occasion, are actionable, if in fact they have produced special damage to the plaintiff, such as the law does not deem too remote:" Odgers' Law of Libel, 3rd ed., p. 95.

This formula is amply borne out by *Ratcliffe v. Evans*, [1892] 2 Q.B. 524, particularly in the judgment of Bowen, L.J., at p. 527: "That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law."

And Mr. Odgers points out on pages 96 and 97 that there is nothing really counter to this proposition in the decisions in *Kelly v. Partington* (1833), 5 B. & Ad. 645; and in *Sheahan v. Ahearne* (1875), Ir. R. 9 C.L. 412, notwithstanding the extremely wide wording of the headnotes to these cases.

Enquiry in this case is, therefore, limited to the question whether this alleged special damage is such as the law will recognize as being the natural and reasonable result of the defendant's act, or whether it ought to be deemed too remote. Can any one say that this special damage ought to be considered the fair and natural result of the speaking of these words? If the plaintiff's wife left her husband's home on this account, did she not plainly act without reasonable cause? And if she were suing for alimony, what would the Court say as to the sufficiency of this ground for leaving? There can be only one answer to these questions. As well might she assume to leave her husband because some other woman made uncomplimentary remarks about his personal appearance: see *Mayne on Damages*, 6th ed., pp. 47-48, 63.

I think the withdrawal of the case from the jury was clearly right, and that this motion must be dismissed, but under the circumstances, without costs.

BRITTON, J.:—I agree that the motion should be dismissed solely upon the ground that the special damage claimed, and which the plaintiff was prepared to prove at the trial, namely, that the plaintiff's wife left him, and that Olive Batson ceased to board with the plaintiff on account of the words complained of, are too remote. The words spoken are not actionable without special damage. They are actionable if not true, if damage actually resulted, and if such words are calculated in the ordinary course of things to produce such damage.

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“Damage is said to be remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it, as that the offending party can be made responsible for it.”

Can it be said that such words, falsely spoken by friend or foe, are likely to cause, as a natural and reasonable result, the separation of husband and wife, or the loss of a boarder? I think not.

The case of *Lynch v. Knight* (1861), 9 H.L. 577, was cited by plaintiff to shew that special damage might be the separation of husband and wife. No doubt about that; but the present decision is quite in line with that case.

Lord Wensleydale says, at p. 600: “To make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow.”

Applying that test to the words spoken in this case, I do not think the consequences alleged could fairly and reasonably have been anticipated or even feared.

I had at first a little doubt as to the boarder, Olive Batson, but none as to the plaintiff's wife.

This point was not made by the defendant at the trial or upon the motion before the Divisional Court.

The learned trial Judge ruled that the words were not actionable, even if special damage were proved; and the evidence tendered by the plaintiff was rejected, and the action dismissed on that ground.

I think this was a wrong view of the law.

As the point upon which the defendant now succeeds was not taken at the trial, or in his statement of defence, there should be no costs of this motion.

G. F. H.

[IN THE COURT OF APPEAL.]

McKAY V. GRAND TRUNK R.W. CO.

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Jan. 26.

Railway—Crossing—Speed of Trains—Fences—Statutory Requirements—Negligence—Injury to Person Crossing Track—Contributory Negligence—Findings of Jury.

By the Dominion Railway Act, 1888, sec. 197, as amended by 55 & 56 Vict. ch. 27, sec. 6, it is provided that "at every public road crossing at rail level of the railway, the fence on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." By sec. 259 of the former Act, as amended by sec. 8 of the latter, it is provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act:"—

Held, that the words "in the manner prescribed by this Act" do not refer to the turning in of the fence to the cattle guards; and, although no other fence is specifically prescribed in the railway legislation, the meaning of sec. 259 is, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveller while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour.

The plaintiff was struck by a train at a crossing over a main street in an incorporated town, not protected by a gate or watchman. In an action to recover damages for his injuries, the jury found that the train was travelling at the rate of twenty miles an hour, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part; and the Court, though there was strong evidence of contributory negligence, declined to interfere.

APPEAL by the defendants from the judgment of MacMahon, J., in favour of the plaintiff, upon the findings of the jury, in an action tried at Sarnia, brought by Joseph McKay to recover damages arising from a collision between his horse and buggy and an engine of the defendants at a crossing of the defendants' railway in the town of Forest, which caused the death of his wife and two children, personal injuries to himself, and the destruction of his horse and buggy.

The questions submitted to the jury and their answers were as follows:

1st. Was the whistle blown before reaching the Mair street crossing, and if so at what distance from the crossing was it first sounded?

Yes. At the whistling post.

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2nd. If the bell was rung, where did it first commence to ring, and was it ringing continuously or at short intervals until the engine crossed the street where the accident happened?

Bell started to ring east of Main street eight or ten rods, and rang continuously.

3rd. Is the main street crossing at Forest in a thickly peopled portion of the village?

Yes.

4th. At what rate of speed was the engine running at the time it crossed Main street?

About twenty miles an hour.

5th. Was such rate of speed, in your opinion, a dangerous rate of speed for such locality?

Yes.

6th. Was the death of Mrs. McKay and the injury to Joseph McKay caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission, in your opinion, which caused the accident?

(a) Yes. (b) Neglect in running too fast and for the neglect of a flag man or gates.

6a. Was any warning given by Hallisey to Mrs. McKay of the engine?

Not sufficient.

7th. Could Joseph McKay, had he used ordinary care, have seen the engine in time to have avoided the collision?

No.

8th. Was the plaintiff, in your opinion, guilty of any want of ordinary care and diligence which contributed to the accident? If so, state in what respect?

No.

9th. If you find the plaintiff is entitled to recover, at what do you assess the damages?

(a) By reason of the death of his wife?

Eight hundred dollars.

(b) By reason of the injuries suffered by himself?

Four hundred dollars.

(c) For the horse and buggy?

One hundred dollars.

The appeal was heard by OSLER, MACLENNAN, and GARROW, JJ.A., on the 21st November, 1902.

W. R. Riddell, K.C., for the appellants. The plaintiff was warned by one Hallisey and others, but paid no attention to the warnings. The whistle was blown at the whistling post, as the jury have found. The evidence is overwhelming that the bell was ringing continuously for more than 80 rods east of the crossing, and the answer of the jury to the second question is against all the evidence. The speed of the train was from 15 to 20 miles per hour. It is not for the Court or jury to say that any particular rate of speed shall be observed, or other precautions taken than those required by the statute. The appellants are to be the judges of the speed of their trains, where the track is fenced in the manner prescribed by the Railway Act: see 55 & 56 Vict. ch. 27, sec. 6 (D.), substituting a new section for sec. 197 of the Railway Act of 1888; and sec. 8, substituting a new section for sec. 259. No other fencing at crossings is prescribed by the Act than the turning in of the fences to the cattle guards. If the defendants have complied with the legislation, as it is not disputed they have done here, that is all that can be necessary. By sec. 10 of the Railway Act of 1888 the Railway Committee of the Privy Council may fix the rate of speed. The want of a flagman could not have caused the accident, as the plaintiff did not listen to the warning of Hallisey, and there is no evidence to support the 6th finding. But, at all events, it is for the Railway Committee to say whether gates or a flagman are required at any crossing: sec. 187 of the Railway Act, 1888; *Stubley v. London and North Western R. W. Co.* (1865), L. R. 1 Ex. 13, 18; *Newman v. London and South Western R. W. Co.* (1890), 55 J. P. 375; S.C., 7 Times L.R. 138, 139; *Cliff v. Midland R. W. Co.* (1870), L. R. 5 Q. B. 258; *Davey v. London and South Western R. W. Co.* (1883), 12 Q. B. D. 70; *Coyle v. Great Northern R. W. Co.* (1887), 20 L. R. (Ir.) 409; *Weber v. New York Central R. R. Co.* (1874), 58 N. Y. 451, 459; *Beisiegel v. New York Central R. R. Co.* (1869), 40 N. Y. 9; *Grippen v. New York Central R. R. Co.* (1869), *ib.* 34, 39. Where there is a body intrusted with the power of ordering gates and watchmen to be placed at crossings, it is not open to the jury to find that these are

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necessary: *Canadian Pacific R.W. Co. v. Fleming* (1892), 22 S.C.R. 33; *New Brunswick R.W. Co. v. Vanwart* (1889), 17 S.C.R. 35, 38, 39. The 7th and 8th findings are against evidence, and there is no reasonable evidence to support them. The duty of persons approaching a railway track is laid down in many cases, such as *Skelton v. London and North Western R.W. Co.* (1867), L.R. 2 C.P. 631; *Davey v. London and South Western R.W. Co.* (1883), 11 Q.B.D. 213, 216, 219; *S.C.*, 12 Q.B.D. 70, 71, 77; *Johnston v. Northern R.W. Co.* (1874), 34 U.C.R. 432. If the crossing were dangerous by reason of obstruction to the view, it was the more incumbent on the plaintiff to take care: *per* Bovill, C.J., in *Skelton v. London and North Western R.W. Co.*, *supra*, at p. 635: and there is no presumption here to assist the plaintiff: *Wakelin v. London and South Western R.W. Co.* (1886), 12 App. Cas. 41; [1896] 1 Q.B. 189 n.

I. F. Hellmuth, K.C., for the plaintiff. This was a particularly dangerous crossing, at an acute angle, the view of an approaching train being obstructed by a house. The action of the town authorities in placing a special watchman at the crossing is cogent evidence of the danger. It was incumbent on the defendants to take special precautions. The defendants did not sound the whistle at short intervals between the whistling post and the crossing, although they did sound it at the whistling post, nor did they keep the bell ringing between the whistling post and the crossing, and the jury have so found in their answer to question 2, and the appellants are therefore liable under sec. 256 of the Railway Act, 1888. The only evidence that the bell was ringing from the whistling post to the crossing was the evidence of the engine driver and fireman, which was contradicted by the evidence of independent witnesses. The evidence established, and the jury found, that the crossing in question is in a thickly peopled portion of the town, that the rate of speed was 20 miles an hour, that this was a dangerous rate of speed for the locality, that the respondent was not guilty of want of ordinary care and diligence, and that he could not have seen the engine in time to have avoided the collision, and the appellants, apart from any statutory duty imposed by the Railway Act, are therefore

liable: *Beckett v. Grand Trunk R.W. Co.* (1885-7), 8 O.R. 601, 13 A.R. 174, 16 S.C.R. 713. If the defendants had placed a flagman there with a light or other means of warning the plaintiff, the accident would not have happened. The man Hallisey placed there by the town for the day had no lantern or other means of warning a person approaching the crossing, and, besides, persons approaching the crossing had no reason to expect any warning from any source, excepting from the whistle and the bell, and from seeing the engine down the tracks, and would not be looking for a flagman at the crossing, since none had been there before. It was admitted for the purposes of the trial that the track was fenced on both sides except on the highway, and that the fence on both sides of the highway were carried into the cattle guards, but, beyond that, no admission was made by the plaintiff at the trial. The defendants were bound by statute to limit their speed to 6 miles an hour at this crossing. Section 197 of the Railway Act, as amended by sec. 6 of 55 & 56 Vict. ch. 27, requires fences or gates across the highway on either side of the tracks, so as to allow of the safe passage of trains, and is intended for the protection of the users of the highway; otherwise sec. 259 of the Railway Act, as amended by sec. 8 of ch. 27, would be senseless legislation. The whole case was for the jury, and they have found for the plaintiff: *Lake Erie and Detroit River R. W. Co. v. Barclay* (1900), 30 S. C. R. 360; *Henderson v. Canada Atlantic R. W. Co.* (1898-9), 25 A. R. 437, 29 S. C. R. 632; *Lett v. St. Lawrence and Ottawa R. W. Co.* (1882), 1 O. R. 545, 11 A. R. 1, 11 S. C. R. 422; *Bilbee v. London, Brighton, etc., R. W. Co.* (1865), 18 C. B. N. S. 584.

January 26. The judgment of the Court was delivered by GARROW, J.A.:—This is an appeal by the defendants against the judgment for the plaintiff at the trial before MacMahon, J., and a jury.

The action is for negligence in the operation of an engine and passenger train at a crossing over Main street, in the town of Forest, on the evening of the 9th October, 1901.

On the evening in question, about 6 o'clock, the plaintiff, a farmer, with his wife and two very young children, was

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driving home from an agricultural fair at the town of Forest which they had been attending. The evening was inclined to be wet, and the plaintiff had, in consequence, put up the sides of the covered buggy in which he and his family were driving, which interfered to some extent with his seeing and hearing. He left the hotel in King street, drove to Main street, and then along Main street to the crossing in question, where the collision took place by which the plaintiff himself was severely injured, his wife and two children were killed, and his horse and buggy destroyed. The track crosses Main street, a leading street in the town, on the level, and is not protected by any gate or by a watchman; although on the day in question one Hallisey, employed by the town corporation, was stationed at this crossing as watchman owing to the number of people who would probably cross to attend the fair. Hallisey saw the plaintiff approaching; he knew the train was about to cross; and he called out to warn the plaintiff of his danger, but without effect. Others also called out to the plaintiff to beware of the approaching train, equally without effect; the plaintiff's explanation in the witness box being that he heard none of these warnings. The plaintiff says he looked to see if the train was in sight, and could not see it. He also says he heard no warning whistle, nor the ringing of the bell. The evidence is clear and distinct that the plaintiff could have seen the approaching train for at least a distance of 40 feet before he reached the track in question, and if he looked he must have looked too soon or imperfectly, and there is no doubt that for at least 8 to 10 rods before reaching the crossing the bell was rung, and the whistle was also sounded at what is called the whistling post. The plaintiff did not stop and listen but drove on in a hurry to get home to his farm, as he says, and knew nothing about the approach of the train until the moment of the collision.

The jury, after a very fair and full charge, practically unobjected to by either counsel, except upon one point which I will mention later on, found that the whistle was blown at the whistling post, the bell commenced to sound 8 to 10 rods east of Main street, and rang continuously; that Main street crossing is in a thickly peopled portion of the village; that the

engine was proceeding at a speed of 20 miles an hour; that such speed was a dangerous speed in that locality; that the death of Mrs. McKay and the injury to the plaintiff were caused by the negligence of the defendants in running too fast and by reason of the want of a flagman or gates; that no sufficient warning was given to the plaintiff in time to have enabled him to have avoided the accident; and that the plaintiff was not guilty of contributory negligence; and they assessed the damages at \$1,300 in all, namely, \$800 for the death of the wife, \$400 for the plaintiff's own injuries, and \$100 for the horse and buggy.

Counsel for the defendants objected, not so much to the charge as to one of the questions, as follows: "Mr. Riddell: . . . Then I object to the question of the rate of speed being a dangerous rate for that locality. I object to that being put to the jury. I do not know that it will have any great effect on the verdict one way or the other, but I submit that is a question that they should not be asked. His Lordship: How would you frame it? Mr. Riddell: I would not ask it at all. It is not the phraseology I object to. However, that is a question probably more of law than of fact."

I can see no force in the objection thus rather faintly urged; on the contrary, the question was, I think, a perfectly proper one to submit to the jury: and in any event if it is, as the learned counsel seemed to think, matter of law rather than of fact, it cannot have affected the result.

The main question in this appeal arises upon the contention of the defendants' counsel, that where the railway track is fenced in accordance with the statute, the maximum speed is not limited to six miles an hour at such crossings as the one in question: and that to fence according to the statute is simply to fence to the cattle guard at the side of the crossing, and to turn in the fence to such cattle guard, leaving the sides of the track where it crosses the highway wholly open, unprotected, and free of access by any one passing along the highway, and that any additional restriction upon the rate of speed must be secured by an application to and an order by the Railway Committee of the Privy Council under the Railway Act.

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The statutory provisions seem to be as follows. By the Railway Act of 1888, 51 Vict. ch. 29, sec. 197 (D.), it was provided that "at every public road crossing at rail level of a railway, the crossing shall be sufficiently fenced on both sides so as to allow the safe passage of the trains." By 55 & 56 Vict. ch. 27, sec. 6, this sec. 197 was repealed, and a new section substituted, which reads as follows: "At every public road crossing at rail level of the railway, the fence on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." Then by the Railway Act of 1888, sec. 259, it was further provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than six miles an hour, unless the track is properly fenced." This also was repealed by 55 & 56 Vict. ch. 27, sec. 8, and a new section substituted; the only change thus made consisting in the substitution of the words "unless the track is fenced in the manner prescribed by this Act," for the words in the former section, "unless the track is properly fenced."

Under the law as it stood before the amendment of 55 & 56 Vict. ch. 27, protection was secured by directing in plain words, that the track should be "properly fenced;" otherwise the speed of the train was not to exceed six miles an hour in such places. "Properly fenced" had the same meaning, I take it, as "efficiently fenced to accomplish the purpose intended," and must, therefore, have included and been intended to include the crossings themselves, the only points at which collisions were reasonably to be expected to occur, and not merely the side fences along the railway, which end at the crossings. The language of the new section is not by any means as clear and as easily understood as that contained in the old; but the purpose and avowed intention is apparently the same, namely, to allow the safe passage of the train at these crossings; and safe passage, of course, must include safe for the crossing public as well as for the passing train. No one in crossing the track would be likely to attempt to cross the cattle guards, which are so placed as to be completely out of the line of ordinary travel, so that the new direction to turn the fences in to the cattle guards is obviously not intended to keep back or protect people

crossing the railway track, although fences so turned in would prevent cattle and horses from straying upon the track at these crossings, and that may have been the object of the change. But, whatever was its object, it appears to me impossible to read it as the defendants' counsel contends, as giving to railway companies a right to cross highways in thickly populated centres at any speed they may choose, provided they have turned in the fences to the cattle guards, leaving the highway as it crosses the track wholly open and unprotected. This contention, if successful, would render senseless sec. 259. The object of that section plainly is one of protection at the crossings; such protection can only be secured, against rapidly moving trains, by fencing or some similar protection; and such fencing must, to be any protection at all, cross the highway at the crossing and so retain the travelling public in a place of safety while a train is passing or immediately about to pass.

There is of course another view. By the new sec. 259 the Legislature clearly intended a fence of some kind to be maintained, and as clearly intended that if no fence was maintained at these crossings then the speed should not exceed six miles an hour; but it has perhaps failed to prescribe the kind of fence which shall be built, because it is clear that a fence leaving the crossing itself entirely open, such as that apparently prescribed by the new sec. 197, could not possibly meet the case of protecting the crossing, and no other fence is specifically prescribed, so far as I can find, in the railway legislation of the country. Now in such a condition of things, and from this point of view, the railway company has one of two courses open. It may at such crossings station a watchman or maintain a reasonable fence sufficient for the purpose, or it may reduce its speed to the permitted maximum of six miles an hour. The defendants do not choose to adopt either course. They say, in effect, the sections in question, as they now stand in the Railway Act, are not at all intended for the protection of the public, but solely in the interests and for the protection of the railway companies; and that they, the railway companies, are subject only to the orders and directions of the Railway Committee as to such crossings as the one in question. But not even the Railway Committee has power to authorize a

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speed exceeding six miles an hour, unless the track is "properly fenced:" see sec. 10 of the Railway Act, 1888; the retention of the latter words "properly fenced" aiding, I think, very materially, in the conclusion which I have reached, namely, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveller while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour.

So that we have in the present case an undisputed finding by the jury that the train in question was travelling at what, if I am right, was the unlawful and highly dangerous speed of twenty miles an hour over a main street in an incorporated town, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part. I am of the opinion that there was evidence, I am inclined to think strong evidence, of contributory negligence on the plaintiff's part; and, if the jury had found against him on that question, I would certainly not have interfered. While it is not yet laid down as matter of law that a person approaching a crossing is bound to stop, look, and listen, he is of course bound to exercise his senses, and to act with reasonable care. The plaintiff says he did look and did not see the approaching train, that he heard no warning of any kind, and he had a right to assume not merely that the ordinary statutory warnings would be given, such as ringing the bell and blowing the whistle, but that the speed of the train at the crossing in question would be a lawful speed, in which latter event he could probably have escaped from the collision, notwithstanding his own previous want of care. The whole matter was one, in my opinion, which could not have been properly withdrawn from the jury, and the appeal therefore fails.

E. B. B.

[IN THE COURT OF APPEAL.]

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Limitation of Actions—Claim against Estate of Deceased Person—Corroboration—Special Agreement—Running Account—Terms of Credit—Demand—Fraud upon Creditors—Pleading.

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The plaintiff claimed from the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1895. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on the 16th May, 1895. This action was begun on the 4th May, 1901. The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible, to get on without the money and to leave it in the hands of the deceased, who said he would save it for the plaintiff, and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go in to the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinct, was given by another witness:—

Held, that there was sufficient corroboration of the plaintiff's statement.

Held, also, that the plaintiff was not obliged to prove a definite term for which credit was given; the agreement was in effect one that the testator was to hold the money at least until the plaintiff demanded it; and, as there was no demand before the 16th May, 1895, the action was in time.

Held, also, that the agreement was not one which offended against the law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it.

THIS action was brought by Joseph F. Wilson against George Howe, David Howe, and Alexander Howe, executors of the will of Marvin Howe, deceased, to recover the sums of \$650, \$100, \$9.65, and \$8.40, under the circumstances set out in the judgments.

The action was tried at Stratford on the 20th and 21st March, 1902, before BRITTON, J., without a jury.

J. P. Mabey, K.C., and *J. C. Makins*, for the plaintiff.

J. Idington, K.C., and *R. S. Robertson*, for the defendants.

April 15. BRITTON, J.:—This action is brought by the plaintiff, who is a son-in-law of the deceased Marvin Howe, to recover \$650, the amount of an account for work and labour and for articles sold to Marvin Howe prior to his death. Marvin Howe died on the 17th March, 1895. The contention

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on the part of the plaintiff is, that payment of this account was not to be demanded, but that the deceased was to keep the money in trust, as a nest egg for the plaintiff, or for the plaintiff's wife, and that the amount was to be expended in the purchase of a house for the plaintiff, or for the plaintiff's wife.

The plaintiff claims a further sum of \$100, alleged to have been due from the defendants to the plaintiff's wife as part of the consideration to the plaintiff's wife for signing certain documents in connection with the estate. The defendants by way of defence raised every objection to the plaintiff's right to recover.

I have carefully considered all the evidence in the case, and the able arguments of the learned counsel, and now dispose of it, as follows:—

1. I find for the defendants upon the claim of \$100, alleged to be due to the wife of the plaintiff, and assigned to the plaintiff, as set out in paragraphs 5 and 6 of the statement of claim.

2. I find that the deceased Marvin Howe at the time of his death was indebted to the plaintiff in the sum of \$450. The amount of the account as entered in the books, which the plaintiff produced at the trial is, in round figures, \$550. Allowing for some overcharge and striking off some items, as to which a doubt was cast, I fix the amount at \$450, as above. The plaintiff's evidence as to this indebtedness was corroborated by other material evidence. It was not corroborated as to every item, but the account is a connected one, and I think there is corroboration as to the indebtedness on the part of the deceased, to the amount named by me. The account is distinguishable from the account in *Re Ross* (1881), 29 Gr. 385.

3. I find that while the deceased asked the plaintiff to keep his account separate from other accounts, and not put it in his regular books, so that the amount would not be available for creditors of the plaintiff, if he should fail in business, and while deceased spoke of buying a house for the plaintiff, or for the plaintiff's wife, there was no such definite bargain made, or understanding arrived at, as would prevent this debt from being payable immediately upon the goods being delivered and the work done. Upon the evidence, I am not able to find that

the deceased was a trustee of the money for this debt for the plaintiff, or for the plaintiff's wife. The plaintiff's evidence on this point is that Marvin Howe said, if the plaintiff could get along without the money, he, Marvin Howe, would save it, and would put it in a house or double the account.

On cross-examination the plaintiff stated: "The arrangement was that whatever account he ran and would run he would pay me any time I wanted the money, and if I did not want it, he would keep it for me and put it in a house."

The evidence of the plaintiff's wife is: "Father said to put the account separate into a small book, not in a large book; if my husband got into trouble we could have this. Father said he would keep the money until the house was bought."

The case is very different from the mere deposit of money for safety until demand, as was the case in *In re Tidd, Tidd v. Overell*, [1893] 3 Ch. 154.

What plaintiff and his wife depose to as an agreement is not such as to constitute an express trust so as to oust the operation of the Statute of Limitations.

Then, even if any definite agreement can be made out from the evidence of the plaintiff and wife, or either of them, there is not, in my opinion, any corroboration. And I think corroboration necessary, as upon this agreement depends the plaintiff's right to recover. A new state of things is set up, altogether different from the original indebtedness. There is corroboration that the account was to be kept separate, and that the deceased intended to help the plaintiff or his wife buy a house. That is not corroboration of an agreement constituting the deceased a trustee.

Then, whatever the understanding was, or whatever was intended by the deceased, in regard to keeping the account separate and holding back payment of it, did it refer to anything more than the general blacksmithing account? I make no finding on that point.

The result of my findings upon the facts is, that the plaintiff's claim as set forth in the 2nd and 3rd paragraphs of the statement of claim is barred by the Statute of Limitations.

Upon the alleged claim set out in the 7th paragraph of the plaintiff's statement of claim, I find that the defendants are

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not indebted to the plaintiff in any greater sum than the \$5 paid into Court. This sum of \$5 so paid in belongs to the plaintiff, and as to any other claim made herein the plaintiff fails, and the action must be dismissed with costs to be paid by the plaintiff to the defendants.

The plaintiff appealed to the Court of Appeal from this judgment, and his appeal was heard by OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on the 19th November, 1902.

J. P. Mabee, K.C., for the appellant.

J. Idington, K.C., for the defendants.

January 26. The judgment of the Court was delivered by GARROW, J.A.:—The only question involved in this appeal relates to the plaintiff's claim for work done and goods supplied upon what is called the running account against the late Marvin Howe, all other claims having been abandoned by his counsel on the argument of the appeal.

The action was tried before Britton, J., without a jury, who found the amount of this account to be \$450 owing by deceased at his death, but he also found that the plaintiff's claim was barred by the Statute of Limitations. The learned Judge's finding as to the application of the statute is as follows: "I find that while the deceased asked the plaintiff to keep his account separate from other accounts, and not put it in his regular books, so that the amount would not be available for creditors of plaintiff, if he should fail in business, and while deceased spoke of buying a house for the plaintiff, or for the plaintiff's wife, there was no such definite bargain made, or understanding arrived at, as would prevent this debt from being payable immediately upon the goods being delivered and the work done. Upon the evidence, I am not able to find that the deceased was a trustee of the money for this debt for the plaintiff, or for the plaintiff's wife."

The learned Judge also stated that, even if a definite agreement could be held to have been made, which would have the effect of suspending the Statute of Limitations, there was not, in his opinion, corroboration of the plaintiff's evidence as to such an agreement. The learned Judge further states in his

reasons for judgment that "whatever the understanding was, or whatever was intended by deceased, in regard to keeping the account separate and holding back payment of it, did it refer to anything more than the general blacksmithing account? I make no finding on that point."

The last mentioned finding or statement has reference to the fact that the account is made up of a general blacksmith's account and of articles of agricultural machinery supplied by the plaintiff from time to time to deceased. I may say at once that, after a careful perusal of the evidence, I can see no sufficient reason for making a distinction between the blacksmith's account and the other articles supplied. There is no evidence whatever that there were two agreements, one relating to the blacksmith's work and the other to the machinery, or that the one agreement put forward was limited to what would fall strictly within the definition of blacksmith's work. So that, in my opinion, the account must be dealt with as a whole, and the bar of the statute applied, if it is to be applied, to the whole and not to a part only of the account. Nor do I think the agreement set up by the plaintiff one which offends against the law relating to frauds upon creditors, as contended by the defendants' counsel, even if the defendants had put themselves in a position to raise such a question by pleading it, which they did not: *Day v. Day* (1889), 17 A.R. 157.

So that the main question only remains, of whether the plaintiff's claim is barred by the statute. There was, of course, an attempt made by defendants' counsel to discredit the claim itself, and it certainly has the demerit of being stale. But I see no room upon the evidence to seriously doubt the learned Judge's conclusion that the work and services and the goods in question were actually supplied by plaintiff to deceased, and that they have not been paid for.

Even for the staleness of the demand some, if not sufficient, excuse is offered by plaintiff. He undoubtedly sent in the account to the solicitor for the defendants, the executors and sons of the deceased debtor, in pursuance of the usual advertisement for creditors' claims, and it is equally beyond doubt that for some reason he withdrew the account almost at once. The plaintiff's explanation that he did so because the defendants,

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who were brothers of plaintiff's wife, seemed hurt that he should have considered it necessary to send it in, and promised more than once to pay it, seems probable in view of all the circumstances. The defendants were young men, either actually residing at home with their father or in close touch with home, and must have known that there was an account of some kind. They knew all along that the work was being done and the goods supplied on some footing, and that they were not paid for. They seem to have been, taking their own account, in no way startled on finding that there was such an account, or that it was as large as it turned out to be. If it had been otherwise, that is, if they had believed the account to be trumped up or paid, we should surely have had, what we have not, a prompt and specific repudiation of it as an attempt after their father's death to impose upon his estate, of which they were the chief beneficiaries. Instead of which, apparently friendly relations with the plaintiff were continued, the defendants from time to time, as the plaintiff says, promising to pay.

Then one of the brothers got into trouble and transferred his property. This trouble continued during the greater part of two years, and was only finally got out of the way in the year 1900, and the action began on the 4th May, 1901.

Marvin Howe died on the 17th March, 1895, and probate of his will was granted to the defendants on the 5th April, 1895. He appears to have been a well-to-do farmer, owning and cultivating 150 acres of land near the town of Listowel, where the plaintiff carried on the blacksmith's business, and another farm in the township of Wallace occupied by his son the defendant David Howe. The defendant George Howe was a school teacher in the neighbourhood, and the defendant Alexander Howe resided with his father. The plaintiff was married to a daughter of the deceased, and commenced business after his marriage, in April, 1888, at Listowel. He began on a small capital, said to have been only about \$200. Early in his business career the deceased, who was a customer of plaintiff's, proposed that the plaintiff should keep the account against deceased separate from his other accounts, that he should try, if possible, to get on without it, and to leave it in the hands of deceased—the deceased saying, "I will save it

for you and put it in a house," and that he would give the house to either the plaintiff or his wife, and to this proposal the plaintiff apparently acceded.

He kept the account by itself in separate books, produced at the trial, and he never rendered the account or demanded payment from the beginning in 1888 till he sent in the account to the defendants' solicitor on the 16th May, 1895. The plaintiff further says in his testimony: "He" (deceased) "never asked for the account, and I was not to render it till I needed the money, and I wanted to save the money to put it into a house. I could have rendered the account lots of times, and got my money if I had wanted to spend that money, but I wanted to keep that for a house." Subsequently and not long before Marvin Howe's death there was conversation between the parties about purchasing a particular house (Mrs. Swan's) at \$700, but nothing came of this, and it is only useful as a part of the corroboration of the plaintiff's main testimony as to the terms on which the account in question was incurred.

With reference to the question of corroboration there is, in my opinion, sufficient, and indeed ample, corroboration of the plaintiff's account of the matter. There is no necessity in law to corroborate each and every item of the account, or each and every material term of the special contract between the parties. All that is necessary is to shew by some evidence in addition to the plaintiff's that his statement of the matter is true or probably true: *Radford v. Macdonald* (1891), 18 A.R. 167; *Green v. McLeod* (1896), 23 A.R. 676.

Now, there is no reasonable doubt about the fact that Marvin Howe dealt with plaintiff from 1888 till his death in 1895, and that his account from the beginning was kept in a separate book or books. Both the general and the separate books were produced at the trial and before us, and this fact is apparent. Some explanation of this unusual condition is at once naturally sought, and is found, I think, in the deposition of the plaintiff, before quoted in part, and of his wife, the latter stating, as found by the learned Judge, that "Father said to put the account separate into a small book, not in a large book. If my husband got into trouble he could have this. Father said he would keep the money until the house was bought."

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And in the depositions of Samuel Holmes, called for the plaintiff, who says that deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so if anything happened the account would not go into the wholesale men, and that he intended to buy a house for the plaintiff's wife; and similar evidence, although less distinct, was given by the witness Woods. So that, upon the whole evidence, it appears to me that the plaintiff's account of the matter is sufficiently corroborated even without the evidence of his wife. But I do not understand the learned Judge to have disbelieved either the plaintiff or his wife. On the contrary, he appears to have accepted both as credible witnesses, and to have treated the case as failing because no definite agreement for credit was proved, or, if proved, sufficiently corroborated.

I am, with the greatest deference, of a different opinion on both points, probably because I approach the matter from a somewhat different standpoint. The first consideration, it seems to me, is, was the dealing between the parties one for cash or upon credit? The learned Judge has found that it was for cash, and not upon credit. Why? Because, in his opinion, no definite terms of credit were agreed upon or proved. This, I think, is to exalt the definiteness of the terms of credit into a position of prime importance to which it is not entitled.

The real question is, was there credit given at all, upon any terms, definite or otherwise? And I think clearly there was, and therefore the plaintiff could not have sued Marvin Howe successfully until the term of that credit, whatever it was, had expired or in some way been determined. The statute begins to run from the breach, not from the promise: *East India Co. v. Oditchurn Paul* (1849), 7 Moo. P.C. 85.

Then, if the dealing between the parties was upon a footing of credit instead of cash, even if the actual term of such credit is not clear upon the evidence, a demand of payment would, I think, be necessary before action. Such a demand would seem to be involved as a necessary or implied term in the contract, which is practically one to pay upon request, just as in the

case of money sued for as paid in mistake: see *Freeman v. Jeffries* (1869), L.R. 4 Exch. 189.

But, in my opinion, the plaintiff is not obliged to rest upon an implied promise to pay upon request. If his story is believed and accepted, as I think it should be, there was an express agreement between them that Marvin Howe was to hold the money at least till the plaintiff demanded it. It did not and could not, having regard to this agreement, have become due and payable until so demanded, with the result, which I think inevitable, that, as there was no demand proved prior to the 16th May, 1895, the action was in time; and, therefore, that the appeal must be allowed, and judgment granted in plaintiff's favour for the amount found to be owing, with interest; such judgment to be, of course, with costs in this Court and in the Court below.

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[FALCONBRIDGE, C.J.K.B.]

1902

BODWELL V. McNIVEN.

Dec. 17.

Specific Performance—Taking Possession—Acts Constituting Part Performance.

Possession is part performance both by and against the stranger and the owner.

On negotiations for the purchase of land, the owner's agent told the defendant that the lot was his. Defendant went on the lot and set in the ground a number of stakes to mark out the foundation of a proposed house, and then changed his mind and refused to carry out the purchase :—

Held, that what he had done constituted such a taking of possession as to constitute part performance, and that the plaintiff was entitled to the usual judgment for specific performance.

THIS was an action for specific performance of an agreement for the sale and purchase of land, brought by the vendor, Eliphalet Bodwell, against the purchaser, Hugh McNiven, and tried at the Woodstock Assizes on the 12th of December, 1902, before FALCONBRIDGE, C.J.K.B., without a jury.

The facts are set out in the judgment.

Hegler, K.C., and *J. Hegler*, for the plaintiff, contended that the acts done by the defendant were sufficient to allow parol evidence to be given, and amounted to a part performance, and that the plaintiff was entitled to specific performance.

J. M. McEvoy, and *J. L. Patterson*, for the defendant, contended that the defendant's acts were a mere marking out of the boundary of a proposed house, not in any way equivalent to a taking of possession, and that the evidence shewed he declined to commence to excavate "until he got his papers," and that the plaintiff did not give possession, nor did the defendant intend taking possession, or think he was doing so; and cited *Fry on Specific Performance*, 3rd ed., secs. 587 and 588; *Campbell v. McKerricher* (1883), 6 O. R. 85, and cases there cited.

December 17. FALCONBRIDGE, C.J.:— Possession is part performance both by and against the stranger and the owner: *Fry on Specific Performance*, 3rd ed., sec. 604.

The only question here is whether the character of the acts done is sufficient to constitute part performance.

Defendant went on the land, with the assent of plaintiff's agent, and set in the ground a number of small stakes of about two inches in diameter, for the purpose of laying out or marking the foundation of a house, which he was thinking of building. He got an estimate or bill of lumber from a builder, and finding that the house was going to cost too much, he changed his mind, and refused to carry out the verbal agreement.

Defendant admits that plaintiff's agent told him the lot was his (defendant's), to which the agent adds (and I accept his statement) that he (the agent) told defendant to go on and build. Defendant says he set out the stakes in pursuance of what the agent told him.

It was proved, by a witness called by defendant, that the plaintiffs had refused to entertain a proposal from a third person for the purchase of this lot, which they were under the impression that they had sold or agreed to sell to the defendant.

On the whole, I think that there was such a taking of possession as to constitute part performance, and that the plaintiff is entitled to the usual judgment for specific performance, with costs.

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Falconbridge,
C.J.

[IN THE COURT OF APPEAL.]

C. A.

1903

Jan. 26.

BLAIN V. CANADIAN PACIFIC R.W. CO.

Railways—Negligence—Assaults on Passengers—Duties of Conductor—Admissibility of Evidence.

The plaintiff, a ticket holder and passenger on one of the defendants' trains, was, without any provocation, assaulted several times by a drunken man. The conductor did not see the assaults, but was told of them, and of the assailant's threats to continue them, and yet refused to restrain the latter or to put him off the train:—

Held, that the defendants' duty to the plaintiff as a passenger was to carry him to his destination, and use reasonable care and diligence in providing for his comfort and safety while so conveying him; and that it was for the jury to decide whether the conductor had acted reasonably and diligently, and judgment upon a verdict of the jury in the plaintiff's favour was affirmed.

Held, also, that evidence was rightly rejected of improper relations between the plaintiff and the wife of his assailant, alleged as provocation for the assaults.

Pounder v. North Eastern R. W. Co., [1892] 1 Q.B. 385, discussed.

THIS was an appeal by the defendants from the judgment entered by Falconbridge, C.J.K.B., at the trial, upon the verdict of the jury finding in the plaintiff's favour and awarding him \$3,500 damages.

The action was for the recovery of damages for the negligence of the defendants or their servants in failing, after due notice, to properly guard and protect the plaintiff against certain assaults, made upon him on one of the defendants' trains, under the circumstances detailed in the judgment.

The appeal was argued on May 13th, 15th, and 16th, 1902, before OSLER, MOSS and GARROW, JJ.A.

E. F. B. Johnston, K.C., and *Shirley Denison*, for the appellants, contended that the conductor had no power to arrest, assault not being one of the offences for which there could be an arrest without warning: *Crim. Code*, sec. 552; that as the conductor did not himself see what happened, if he had arrested Anthony and he had proved to be the wrong man, there would have been no defence to an action for false arrest; that the conductor had done all that was reasonable: *Pounder v. North Eastern R. W. Co.*, [1892] 1 Q.B. 385; that the American cases had gone further than the English, clothing

railway conductors with a sort of police power; that in the case of passengers, railway companies are only required to use reasonable care to see that the track and vehicles are in proper condition, but are not responsible for the conduct of passengers: *Cobb v. The Great Western R.W. Co.*, [1894] A. C. 419; *East Indian R. W. Co. v. Mukerjee*, [1901] A. C. 396; *Putnam v. Broadway and Seventh Avenue Railroad Co.* (1873), 55 N.Y. App. 108, at pp. 114, 118; *Mullan v. Wisconsin Central Company* (1891), 46 Minn. 474; *New Orleans, St. Louis, and Chicago Railroad Co. v. Burke* (1876), 53 Miss. 200 (24 Amer. R. 689), at p. 696; that the damages were excessive in any view; that evidence should have been admitted in mitigation of damages, to shew the relations between Mrs. Anthony and the plaintiff, and the consequent hostile relation between the plaintiff and his assailant, which was known to the plaintiff but not to the defendants; that if such evidence had been admitted it would appear that the defendants' negligence was not the proximate cause of the plaintiff's injuries.

W. R. Riddell, K.C., *D. O. Cameron*, and *J. G. O'Donoghue*, for the plaintiff, contended that the conductor had ample notice of the threatened assaults, and had promised to have the assailant arrested at Parkdale; that secs. 58 and 289 of the Railway Act of 1888 gave a right of action to persons injured by non-performance by the railway officials of their duties as prescribed by the by-laws: *Goodeve on Railway Passengers*, p. 13; that the principle followed in the American cases is the same as in the English cases: *Lucy v. Chicago Great Western R.W. Co.* (1896), 64 Minn. 7; *Wood on Railways*, 1st ed., vol. 2, pp. 1176, *et seq.*; *Goodeve, ib.*, p. 3; that the conductor had power to arrest: *Crim. Code*, secs. 552, and secs. 242, 250, 251; that "found committing" does not necessarily mean "sees committing;" that the cases shew that the duty of a railway company is to do all that they reasonably can to see that their passengers are carried safely, although they are not liable for assaults which they had no reason to anticipate, such as a sudden riot or an influx of passengers, impossible to prevent: *Jackson v. Metropolitan Railway Co.* (1877), 2 C.P.D. 125, especially at pp. 141-2, 3 App. Cas. 193; *Hogan v. South Eastern R.W. Co.* (1873), 28 L.T.N.S. 271, especially at pp.

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272, 3; *Cannon v. The Midland Great Western R.W. Co.* (1879), L.R. 6 Ir. 199, at pp. 207, 208; *Cobb v. Great Western R.W. Co.*, [1893] 1 Q. B. 459, [1894] A.C. 419; that *Pounder v. North Eastern R.W. Co.*, [1892] 1 Q. B. 385, proceeded on the theory that the company had no reason to anticipate injury to the plaintiff, and that it had not been approved of in subsequent cases: *Cobb v. Great Western R.W. Co.*, [1894] A.C. 419, at pp. 423-4. They also referred to *East Indian R.W. Co. v. Mukerjee* (1898-1901), 26 Indian L.R. 465, [1901] A.C. 396; *Noden v. Johnson* (1850), 20 L.J.Q.B. 95; *Vinton v. Middlesex Railroad Co.* (1865), 11 Allen 304; *Mastad v. Swedish Brethren* (1901), 53 L. R. A. 803; *Rommel v. Schambacher* (1887), 120 Penn. 579; *New Orleans, etc., Railroad Co. v. Burke*, 53 Miss. 200; *Lone v. Great Northern R.W. Co.* (1893), 62 L.J.Q.B. 524; *Desty's Manual of Law of Shipping and Admiralty Law*, sec. 269, and cases cited; Articles in 8 L. Q. R. 182, 18 Law Mag., 49.

Johnston, in reply, said that there was a distinction between the powers of a conductor of a train and those of a master of a ship: *Hall v. Memphis and Charleston R.W. Co.* (1882), 15 Fed. R. 57; *Abbott on Shipping*, 14th ed., p. 1165; that no doubt where there is a continuing grievance the company must use reasonable precautions, but that here every attack made was the result of impulse: *Jackson v. Metropolitan Railway Co.*, 2 C.P.D. 125, 3 App. Cas. 193; *Kinney v. Louisville and Nashville Railroad Co.* (1896), 99 Ky. 59; and that there was no evidence here of the kind of negligence for which a railway company could be held responsible, or if there was, that it was only so as to the third attack, so that damages were assessed on a wrong basis.

January 26. MOSS, C.J.O.:—This is an appeal by the defendants from the judgment entered by Falconbridge, C.J., at the trial upon the verdict of the jury finding in the plaintiff's favour and awarding him \$3,500 damages.

The plaintiff was a passenger on one of the defendants' trains, as holder of a ticket issued by the defendants entitling him to be carried as a first-class passenger from the city of Toronto to the town of Brampton.

While on the train in question on the night of October 10th, 1901, he was thrice assaulted and beaten by a fellow-passenger. The injuries inflicted were severe, permanently impairing his hearing and otherwise affecting his health.

The action is for the recovery of damages for the negligence of the defendants or their servants in failing, after due notice, to properly guard and protect the plaintiff against the assaults of which he complains.

The defendants deny liability, allege that they did through their servants and agents to the best of their ability preserve order on their train, and as far as they were able to do so, protected the plaintiff from being beaten or assaulted, and further, that if plaintiff suffered any damage by reason of the assaults of which he complained, such assaults were induced by his own conduct.

The last allegation may be disposed of at once by the observation that no evidence was given or tendered at the trial to shew that there was anything in the plaintiff's conduct on the train before or at the time of the several assaults calculated to provoke them. He appears to have conducted himself throughout in a peaceable and lawful manner. He was guilty of no act while at the station or on the train which could in any manner justify the assaults made upon him. The defendants did tender evidence with a view of shewing that the relations between the defendant and his assailant were of a hostile and unfriendly nature, and they complain that this evidence was improperly rejected, but this will be again referred to.

At the trial it was shewn that the plaintiff and his wife boarded the train at the Union Station at Toronto shortly before the hour of the night at which it was timed to depart. That amongst other passengers was one Anthony, by whom the assaults were committed; that Anthony was drunk and quarrelsome, and that before he first struck the plaintiff he violently assaulted another passenger named Noble without any provocation whatever, seizing him by the throat and swearing he would choke him.

Very soon after this he assaulted the plaintiff, striking him from behind, so that he fell forward among the seats of the

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car, and repeating his blows until the plaintiff escaped. During the scuffle Anthony struck Mrs. Clendenan, another passenger, a violent blow on the arm, and he also used violent and threatening language towards one Thorburn, another passenger.

The plaintiff left the car to seek a constable, and during his absence Anthony assaulted one Beattie, another passenger. Soon after the conductor entered the car and spoke to Anthony, warning him against making a disturbance. The plaintiff having failed to find a constable, returned to the train just as it was about to move off, apparently after having been already started and drawn up again. Before getting upon the train again he told the conductor, in the presence of the brakeman and others, that he had been assaulted in the car, and that two or three others had also been assaulted, and that he wished the man arrested and put off the train. He told the conductor that he would not go on if the man was allowed to go on, that he was drunk, and had assaulted him and two or three others. The conductor said the man had a ticket, and had as much right as the plaintiff had to go on, but finally told the plaintiff to go on, that "we will have a constable at Parkdale." The plaintiff thereupon entered the train and it proceeded to Parkdale. At Parkdale the plaintiff renewed his request to the conductor to get a constable. He told him he had been informed that the man intended to attack him again, to which the conductor replied that the plaintiff was the only man creating a row.

The plaintiff continued urging the conductor to get a constable, but the latter signalled the train to start, and told the plaintiff to get on board or he would be left. His wife was in the car, he had no means of communicating with her, and he got on. Not long after he was again assaulted by Anthony and received very serious injuries. He again complained to the conductor, who took the position that he could do nothing unless he saw the man strike the plaintiff, to which the plaintiff not unnaturally replied that it was very unfair if he was not to be believed until he was killed. The conductor refused to do anything and went away, and shortly after Anthony renewed the assault. In consequence of this, and of his wife's fright, the plaintiff and his wife left the train at Streetsville and passed the remainder of the night there.

The conductor was not called as a witness at the trial, but portions of his depositions taken on examination for discovery were put in by the plaintiff. He would not deny that the plaintiff complained to him of Anthony at the Union Station and Parkdale. Asked how many passengers spoke to him that night about Anthony, he replied that he did not know—there might have been twenty, there might have been forty for all he knew. He admitted that after the second assault the plaintiff complained to him and wanted him to put Anthony off. He was told of the assault by a great many other people, but did not think it as bad as the plaintiff tried to make out. He told Anthony he would put him off. Asked "Then you did think it was your duty to put this man off?" he answered: "No, I did not think it was my duty to put that man off. He was not in a fit state to be put off." Q. "Then he was drunk?" A. "Yes." Q. "He was too drunk to be put off?" A. "Yes, I think he was." And again: Q. 135. "And you were going to put him off?" A. "I told him I would put him off if he didn't behave." Q. "And he got hold of the seat and was hanging on to the seat and you let him go?" A. "Something like that; I would not be positive. I think when the train was stopped we were closing the switch." He was then speaking of a time after the third assault and before the train reached Cooksville, a station just east of Streetsville.

In his charge to the jury the learned Chief Justice, speaking of the conductor's duties, told them that not only in the exercise of his general authority but with reference to the rules of the company he had the right to preserve order on the train, and, if necessary, to eject therefrom persons in a state of intoxication, riotous or disorderly persons, or persons infringing the reasonable rules of the company; that such being his right, it was his duty to exercise that right with reference to the comfort and safety of the passengers under his charge; that he might enforce order and maintain peace in his train with such force as he deemed necessary, even to the ejection of the unruly person; that he was responsible only for the fair and careful discharge of the duty cast upon him; that it was not necessary, in order to fix liability on the defendants, to find that the conductor must have seen the assault; that liability might

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arise if the person who claimed to have been attacked brought home to the conductor knowledge or the opportunity of knowing that an injury was threatened to a passenger, and that further trouble might be anticipated, or made it apparent that the conductor could by prompt intervention have prevented, or at any rate have mitigated the second and third assaults. Then, after pointing out to the jury that the defendants could not be held liable for the first assault, he told them that the question was how far the conductor acted reasonably, having regard to the knowledge and information he had; that by virtue of the powers vested in him by the defendants he was the person having authority on the train; that the defendants were charged through him with the duty of preserving order on the train, and that they were liable for injuries sustained by a passenger in consequence of violence inflicted by a fellow-passenger, provided there had also been a failure on the part of the defendants to discharge their duty. Again, he told them that the law required nothing unreasonable, but the law did require that the conductor should act reasonably; that it would be for them to judge whether the conductor did act reasonably under all the circumstances, whether he had notice or knowledge that subsequent attacks would be made or were likely to be made, and whether he did do what he could to prevent further attacks.

No exception was taken to this part of the charge.

The learned Chief Justice also drew the attention of the jury to the responsible and delicate situation in which a conductor is placed when called upon to act under circumstances such as disclosed, and referred to the instructions or rules for guidance of conductors issued by the defendants, wherein they are told that any disorderly passengers who, by their threatening, obscene or profane language, or by their noisy intoxication endanger the peace or render themselves obnoxious to other passengers, or give them just cause of complaint, may, if they persist after remonstrance, be expelled from the train.

He commented fully on the facts relating to the assaults and on the question of damages.

The jury returned the following verdict: "We find the Canadian Pacific Railway Company guilty of negligence, and allow the plaintiff damages to the amount of \$3,500."

The defendants now contend that there was no evidence of negligence on their part proper to submit to a jury; that it was not the duty of the conductor, none of the assaults having been committed in his presence, to do more than he did to protect the plaintiff; that there was no contract with the plaintiff and no duty at common law to protect him, as they had no knowledge at the time when the contract to carry the plaintiff was made that he required any special or peculiar protection; that the learned Chief Justice erred in rejecting evidence tendered by the defendants to shew that Anthony was under the belief that he had been wronged by the plaintiff in his marital relations and was very hostile to him; and that the damages are excessive.

A further objection was made to the verdict on the ground that the plaintiff's counsel, in his address to the jury, introduced and dwelt on matters irrelevant and unsupported by testimony, and thereby improperly influenced and prejudiced the jury, but at the close of the argument it was arranged between counsel, at the suggestion of the Court, that this objection should be considered as withdrawn.

The duty or obligation which the defendants owed the plaintiff was to carry him to his destination, and to use reasonable care and diligence in providing for his comfort and safety while being conveyed by them.

How far they exercised such reasonable care and diligence depends upon the circumstances which arose and the extent of their notice or knowledge of them in time to prevent them or protect the plaintiff from their consequences. In *East Indian R.W. Co. v. Kalidas Mukerjee*, [1901] A.C. 396, the Judicial Committee of the Privy Council rejected the argument that it may be regarded as settled law that in the case of carriers of passengers under statutory powers there exists an express duty, independently of any implied contract, to carry them safely. Dealing with this contention, the Lord Chancellor said at p. 401: "That is not the law. It appears to have given rise to the impression that that being the state of the law, it was for

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the railway company to prove beyond doubt that they were not responsible for the accident that occurred. As a matter of fact, the argument would be illogical, because if they were carriers of passengers in the sense of being common carriers, they would be responsible quite independently of any question of negligence or not."

Cases have been referred to—English as well as American—in which the broader rule has been acted upon, but for the purposes of this case it may be taken that the law is, that in order to succeed the plaintiff must prove negligence. It follows, of course, that proof of notice or knowledge or reasonable opportunity of knowing of the acts complained of is essential to establish the negligence.

I find it impossible to say that there is not evidence upon which the jury might reasonably find the defendants guilty of negligence.

If the conductor had been present when the assaults were committed, and took no steps to protect the plaintiff or to prevent their recurrence, it could scarcely have been argued that the defendants would not be liable. *Pounder v. The North Eastern R. W. Co.*, [1892] 1 Q.B. 385, which goes furthest in support of the argument of non-liability, is not to be accepted as undoubted law. In *Cobb v. Great Western R. W. Co.*, [1893] 1 Q.B. 459, Lord Esher, M.R., without directly alluding to *Pounder's* case, said at pp. 462-3, speaking of the case then before the Court: "It is not alleged that the plaintiff was being ill-used or assaulted in the train, and that, that fact being made known to the defendants' servants, they did not interfere to protect him. That would be a different case." The Master of the Rolls here stated concisely the present case, and indicated his view of the law under such circumstances. In the House of Lords, [1894] A.C. 419, the Earl of Selborne, referring to *Pounder's* case, said at pp. 423-4: "For my own part, if I thought it necessary in the present case to consider the correctness of that decision, I doubt whether I should be prepared to follow it. . . I am unable at present to see a distinction, satisfactory to my own mind, between such a case and that which the Master of the Rolls justly distinguished from the present, when he said that (in this case) it 'was not

alleged that the plaintiff was being ill-used or assaulted in the train, and that, the fact being made known to the defendants' servants, they did not interfere to prevent it." Lord Morris said that, as at present advised, he should not be disposed to dissent from *Pounder's* case, but the other law lords preferred to reserve their opinion until the question came before the House in a case directly raising it.

The case has not escaped criticism in other quarters. See Beven on Negligence, 2nd ed., pp. 1209, 1212 and 1213, and references in the footnotes.

In the present case there was ample evidence that the plaintiff was assaulted and ill-used in the train, and that the conductor was told of Anthony's conduct and threats to continue it. It was for the jury to judge whether, with the knowledge he had, he acted reasonably and diligently, or whether after being told by the plaintiff and others of Anthony's condition and the assaults he had committed upon the plaintiff and other passengers before the train left the Union Station, and after being again warned at Parkdale, the conductor acted unreasonably and negligently in refusing and failing to take reasonable steps to prevent the after assaults. There is evidence upon which the jury might fairly conclude that the conductor acted unreasonably and negligently in that he did not attend to the remonstrances and requests of the plaintiff and other passengers, and did not put in force the rules of the company authorizing him to put off the train a passenger behaving as Anthony was, or if he was, as the conductor said, not in a fit state to be put off, to place him under such restraint as would ensure the other passengers against a continuance of his course of conduct.

That the conductor was aware that Anthony was not keeping his promise made at the Union Station that he would keep quiet is shewn by his remark to Anthony, "I hear you have been rowing again," and his admissions that from twenty to forty passengers spoke to him of Anthony's conduct. There is no pretence that he was unable to cope with Anthony, or that with the force under his control on the train he could not have placed him where he would have been harmless to the other passengers. There was nothing to except to in, and no exception was taken to, the charge on this part of the case, and the

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jury might well find that there was a negligent failure of duty on the part of defendants.

The evidence tendered as to the supposed relations between the plaintiff and Anthony's wife was, I think, properly rejected. Even assuming what was sought to be proved to have been shewn, it could not justify the defendants' failure to adopt proper means for preventing Anthony from misconducting himself on the train. The plaintiff was there doing no act to provoke the assaults upon him. He was conducting himself properly, and was entitled to the same measure of protection as any other passenger. Nor was it proper to submit it to the jury on the question of damages. The plaintiff was not seeking damages for injury to his personal character and reputation.

It was strongly contended that the amount of damages was excessive.

The plaintiff conceded, and the learned Chief Justice directed the jury that the defendants were not responsible for the first assault at the Union Station. But for the defendants it was urged that in any case they were not liable for the second assault, in which the most serious injuries were inflicted.

If the jury were of opinion, as they must have been, that the conductor, after the notice and knowledge he had from what he was told at the Union Station and Parkdale, did not act reasonably and diligently, but on the contrary was negligent in taking proper steps to secure the plaintiff against further molestation, it cannot be said that they erred in awarding a fairly large sum in view of the evidence as to the nature of the injuries inflicted and their permanent effect.

The learned Chief Justice fully directed the jury on the question, drawing their attention to all the points that were urged in mitigation of damage, and under the circumstances the amount does not appear so large as to warrant interference on that ground.

The appeal should be dismissed.

OSLER, J.A.:—I concur in the result, taking part in the judgment at the express request of the parties.

GARROW, J.A., also concurred.

A. H. F. L.

[IN CHAMBERS.]

RE WILLIAMS.

1903

Jan. 23.

Will—Construction—“All my Children”—Children of Predeceased Child.

The testator by his will directed that after the death of his wife his estate should “be divided amongst all my children.” One daughter died, leaving issue, before the execution of the will :—

Held, that the daughter’s children did not take directly under the will, nor by virtue of sec. 36 of the Wills Act of Ontario, there having been no gift to their parent.

SUMMARY application, by way of originating notice under Rule 938, by James Ailles, one of the executors of the will of Arscott Williams, for an order construing the will and determining whether Bertram E. Webster, Henry A. Webster, Ida M. Webster, and Ernest Webster (an infant), the children of Annie Webster, who was a daughter of the testator, and died not only before the testator but before the execution of his will, were entitled among them to a one-fifth share or interest in the estate of the testator, under his will, as the heirs of their mother.

The testator died on the 26th June, 1893.

The will, so far as material, was as follows :

“I direct that after my death all my property, real and personal, of whatsoever nature and wheresoever situated, be sold as soon as may be done without loss, in the opinion of my executors, and that the proceeds be invested for the sole and only benefit of my wife during her lifetime. I direct that after her death the principal money so invested be divided amongst all my children in equal parts.”

The widow died on the 21st January, 1899. The testator had five children, all of whom but Annie Webster were living.

The motion was heard by MEREDITH, J., on the 19th January, 1903.

D’Arcy Tate, for the executor and the children of the testator.

T. Hobson, for the adult grandchildren.

F. W. Harcourt, for the infant grandchild.

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Meredith J.

January 23. MEREDITH, J.:—The testator's words are plain: "all my children:" there is no ambiguity, patent or latent: see *Higgins v. Dawson*, [1902] A. C. 1: the grandchildren cannot take directly.

But it is contended that they can take under sec. 36 of the Wills Act of Ontario.* The cases, however, are in the teeth of that: see *In re Sir E. Harvey's Estate*, *Harvey v. Gillow*, [1893] 1 Ch. 567, and *In re Coleman and Jarrom* (1876), 4 Ch. D. 165.

And had the well known rule not been applicable, had the case not been one of a gift to a class, had it been one such as was dealt with upon the argument, I would not have found it possible to give effect to the contention, because unable to find in the will any gift to the grandchildren's parent.

In *In re Smith's Trusts* (1875), 5 Ch. D. 497 n., Jessel, M.R., declined to attribute to a testatrix "the capricious intention" that, if a brother died before her will, his children should not take, but, if after her will, they should take. But there the testatrix had provided that, should any of her brothers be dead, their share was to be equally divided among their children; and his conclusion was, that the words "their share" meant the share which they would, if living, have taken, for, as he said, you cannot give a legacy to a dead person, as the testatrix must have known. So that, even that case would not have helped the grandchildren; and it cannot now be looked upon as having been well decided: see *In re Musther, Groves v. Musther* (1890), 43 Ch. D. 569. Here there is no gift to the grandchildren; in the will they are never mentioned: it is upon an Act of Parliament, not an act of the testator, that their claim really rests.

The gift (as a question of the interpretation of the will) must be held to be to persons capable, or at least supposed to

*R.S.O. 1897, ch. 128, sec. 36—Where any person, being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

be capable, of taking. No one, with or without a knowledge of the Act and of such cases as *Mower v. Orr* (1849), 7 Hare 473, would make a gift to a dead person in order that his child or children, or child or children if any, might take; the gift would be to the child or children, or child or children if any. And the word "all" has no contrary signification.

In *Christopherson v. Naylor* (1816), 1 Mer. 320, the words, "to each and every child" and "if any child or children . . . shall happen to die in my lifetime," were held to apply only to death after the making of the will, as the children were to take only in substitution for the parent, who could take only if living at the date of the will.

I fear I could not, in any case, have applied the pretty logic of "We are Seven" to the case, against the materialistic protestations of the living children that though they had been five they were and are but four; but must have held that the dead child is not included in the words "all my children," and so her children would have taken nothing under the will.

The case, from a dry legal point of view, is a plain one.

Order accordingly: costs out of the estate as usual.

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[IN THE COURT OF APPEAL.]

C. A.

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Jan. 26.

RE CITY OF KINGSTON AND KINGSTON LIGHT, HEAT, AND
POWER CO.

*Company — Sale of Gas Works to Municipality — Arbitration as to Price —
Franchise — Ten per Cent. Addition.*

By 54 Vict. ch. 107 (O.) the company was protected against compulsory parting with its works and property to the city until May, 1911; but by an agreement made in 1896 it was provided that, upon the city giving one year's notice, it should have the option of purchasing and acquiring all the works, plants, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business. The city having exercised its option:—

Held, affirming the decision of Lount, J., 3 O.L.R. 637, that, in ascertaining the price to be paid by the city, the arbitrators were right in allowing nothing for the value of the earning power or franchise of the company, and in refusing to add ten per cent. to the price as upon an expropriation under R.S.O. 1887, ch. 164, sec. 99.

AN appeal by the company from an order of Lount, J., dismissing an appeal by the company from the award of the majority of three arbitrators appointed to ascertain the price to be paid upon a purchase by the city corporation of the works, etc., of the company. The facts and arguments are stated in the report of the case below, 3 O.L.R. 637, and in the judgment of this Court.

The appeal was heard by OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on the 23rd September, 1902.

R. T. Walkem, K.C., and *J. L. Whiting*, K.C., for the appellants.

D. M. McIntyre, for the city corporation, the respondents.

January 26. The judgment of the Court was delivered by MOSS, C.J.O.*:—The facts of this case are stated in 3 O.L.R. 637.

The main question in this appeal turns upon the proper construction of an agreement entered into between the Kingston Light, Heat, and Power Company, and the city of Kingston, on the 14th July, 1896.

*Appointed to the Chief Justiceship between the argument and the judgment.

The City of Kingston Gas and Light Company was incorporated by Act of the Legislature of the Province of Canada, 11 Vict. ch. 13, with extensive but not exclusive rights with regard to the manufacture and supply of gas in the city of Kingston. Under sec. 35 of the Act, the company and its powers were to end at the expiration of 50 years, *i.e.*, on the 23rd March, 1898.

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In 1891, the company having in the meantime entered into an arrangement with the Kingston Electric Light Company for the purchase of its plant, an Act of the Legislature of Ontario, 54 Vict. ch. 107, validated the agreement and changed the name of the City of Kingston Gas Light Company to the Kingston Light, Heat, and Power Company. By sec. 10 it was enacted that sec. 35 of 11 Vict. ch. 13 be repealed, thus extending the duration of the company. But it also placed a limit to its existence by providing that, at any time from and after twenty years from the date of the passing of the Act (4th May, 1891), the city of Kingston should have the right to expropriate the works and property of the company in the manner specified. By this enactment the company was protected against compulsory parting with its works and property to the city until May, 1911. But in 1896 the company entered into the agreement now in question, by which it gave to the city a new right to acquire the works and property at an earlier period. The agreement is a lengthy instrument, dealing with several matters; but, as regards the acquisition of the property by the city, the substance of it is, that upon the city giving one year's notice previous to the 1st January, 1902, it should have the option of purchasing and acquiring all the works, plant, appliances, and property of the company used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business.

The city having exercised its option, it was contended before the arbitrators, on behalf of the company, that in ascertaining the price to be paid by the city the arbitrators should allow for the value of the earning power, or franchise, or rights of the company, under 54 Vict. ch. 107, or otherwise. The majority of the arbitrators held that the company was not entitled to

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any allowance in respect of this claim. Their decision was upheld by Lount, J., and the company has renewed its contention in this Court.

We think the arbitrators placed the correct construction upon the agreement. What the company asks is, in effect, that it shall be compensated for the termination of the right which, but for the agreement, it would have of carrying on the business until 1911. That is to say, the company is claiming, not merely the price of the works, plant, appliances, and property of the company used for light, heat, and power purposes, but this price and the price of something else in addition.

No objection has been taken to the amount allowed as the price of the works, plant, appliances, and property, and we must assume that, after due consideration of their value, having regard to their purposes and use, there was fairly allowed for them all that should have been allowed. But the company seeks to add to the sum so allowed something as the value of the earning power which these works, plant, and property might have in its hands if retained until 1911. There is no language in the agreement to justify this contention. The company claims that the right which is thus ended by the agreement is a franchise, and passes under the term "property." But it is manifest that the word is not used in its widest sense, and it was not the intention of either party that it should be so read. Its meaning is restricted by the words which precede it, as well as by those which follow it. It was evidently not intended to comprehend everything the company possessed. The so-called franchise is no more included in the word "property" than the money in the bank, or the book debts or assets of a like nature belonging to the company. It is far from clear that the company parted with anything in the nature of a franchise which it would be of any value to the city to acquire. The company could not, and did not, part with its corporate franchise. The privilege of using the streets for the purposes of the business ended naturally with the purchase of the works, plant, appliances, and property; and it was not needful for the city to acquire either one or the other to enable it to carry on the business.

A good deal was said in argument about the justice of the city paying for all it acquired under the agreement; but the real question on the construction of the agreement is, for what did the city agree to pay? And upon this question the arbitrators came to the proper conclusion.

The appeal also fails as to the claim to add 10 per cent. to the amount of the price found by the arbitrators. There is nothing in the agreement, or in the circumstances, to warrant the arbitrators dealing with the case as one of expropriation under the statute. And, doubtless, the arbitrators in arriving at the price took all the circumstances into consideration, and made every reasonable allowance.

The appeal should be dismissed.

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[DIVISIONAL COURT.]

D. C.

WHITESSELL V. REECE AND PAYNE.

1902

July 28.

Waste—Charge of Annuity—Life Tenant and Remainderman—Apportionment—Damages—Scanty Security—Timber.

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Feb. 28.

A testator seized in fee of land, subject to a mortgage to secure an annuity for his wife, devised the land for life, remainder over in fee. After his death the life tenant continued to pay the annuity to the widow. She also sold the timber on the land, claiming the right to do so on account of her payments on the annuity; and the purchaser having begun to cut the timber, this action was commenced by the remainderman to restrain waste:—*Held*, following *Yates v. Yates* (1860), 28 Beav. 637, that the periodical payments of the annuity must be treated partly as interest which the tenant for life had to pay, and partly as principal for which she would have a charge on the inheritance, in the proportion which the value of the life estate bore to the value of the reversion.

THE plaintiffs are entitled under the will of one Scealey, their grandfather, to the remainder in fee in fifty acres of land in Bayham, expectant on a life estate therein devised by the same will to the defendant Sarah Jane Reece, and the present action is to restrain the defendants from committing waste upon the land by cutting down timber upon it, and for damage done to the plaintiffs' estate by destruction of timber.

The testator Scealey died on May 13th, 1894, seized in fee of the land, but subject to a mortgage made by him on December 2nd, 1886, to trustees, for his wife Jane Moor Scealey, to secure to her the payment of an annuity for her life of \$200 a year, being, as is recited in the mortgage, a compromise of an action for alimony brought by her against her husband. At the time of the testator's death he was still living apart from his wife, and she was about seventy-five years of age; she is still living. Since the testator's death the defendant Reece has paid the annuity to the widow.

On March 14th, 1902, the defendant Reece sold to the defendant Payne the white ash, basswood, elm and oak and black ash upon the land, and agreed that he should have two years to take it off. The consideration agreed on was \$140.

Under this contract Payne had cut down a quantity of timber and removed it, and the present action is to restrain further acts of the same kind, and for damages.

The defendant Payne claims to have purchased in good faith and believing his co-defendant had the right to sell: the defendant Reece claims that having paid eight instalments of the amount, she is entitled to be subrogated to the rights of the mortgagee in respect thereof against the land: that being so subrogated, the land is an insufficient security for her claim against it, and that she had a right to cut down the timber: and further, that the timber was cut down for the purpose of clearing the land for cultivation, and that no waste was committed.

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The action was tried at St. Thomas on June 18th, 1902, before FALCONBRIDGE, C.J.K.B., without a jury, and judgment was delivered on July 28th following.

July 28. FALCONBRIDGE, C.J.:—The life tenant, defendant Reece, has kept up the payments on this mortgage since the testator's death; and recently undertook to sell standing timber on the land to her co-defendant James Payne. Under that agreement the defendant Payne proceeded to cut a large quantity of timber until restrained by order and injunction of the Court. The tenant for life claims to be entitled to be subrogated to the rights of the testator's widow and of her trustees in respect of and to the extent of the amounts which the tenant for life has paid on the mortgage; and argues that these payments, or a great proportion of them, ought to be regarded as principal, and that the tenant for life is bound, as between herself and the remaindermen, only to keep down the interest, and invokes the doctrine of *Brethour v. Brooke* (1893), 23 O.R. 658, 21 A.R. 144, viz., that where the security is scanty and the interest in arrear, the mortgagee may provide for his own safety by cutting down trees. The present value of the farm is, on the evidence of all the witnesses, not more than \$1,500; but plaintiffs' witnesses swore that, if it had been kept in the same condition as it was in at the time of the testator's death, it would be worth \$2,500.

The defendant Reece cannot make the above stated doctrine applicable to her case. The estate came to her subject to that mortgage. What she has paid on it was paid for her benefit,

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she no doubt taking chances on the probability of life of an aged woman. If the defendant Reece has paid or may pay, under these circumstances, more than the value of the estate, that is her affair; and she is not entitled to any particular consideration, inasmuch as she took under testator's will, besides this land, the bulk of his property. If the defendant Reece has, in truth, paid off anything which can be considered as principal, she will be entitled to hold it without interest as a charge on the land as against the remaindermen, under *Macklem v. Cummings* (1859), 7 Gr. 318; but this is not the point in question here; and the defendant Reece had and has, therefore, no right to commit the acts of waste complained of.

As to the amount and value of timber cut, and as to the relative condition of the farm fences and buildings now and at the time of the testator's death, the evidence for the plaintiffs is far superior to that offered by the defendants, both in quantity and quality; and it is also quite clear upon the evidence that the defendants cannot shelter themselves under *Drake v. Wigle* (1874), 24 C. P. 405, for I find that the timber was not cut down for the purpose of bringing the land under cultivation, nor was it done in conformity with good husbandry, and defendant Reece is not farming the property or making reasonable use of that part of the lot which is supposed to be arable land, and the inheritance is damaged, beyond question, by the acts complained of.

Judgment making injunction perpetual, and awarding plaintiffs \$400 damages, and full costs of suit. Stay of proceedings for thirty days, except as to the injunction; and if within that time the defendant Reece shall pay \$400 into Court, she may have the interest thereon paid to her during her life; on her death the principal to be paid out to the plaintiffs.

The defendants appealed, and the appeal was argued on January 13th, 1903, before a Divisional Court (STREET and BRITTON, JJ.).

J. A. Robinson, and *V. Sinclair*, for the defendants, as to the right of the defendant Reece to be subrogated as claimed, referred to *Burrell v. Earl of Egremont* (1843), 7 Beav. 205; *In re Harvey*, *Harvey v. Hobday*, [1896] 1 Ch. 137; *Bulwer v. Astley* (1843), 1 Ph. 422; *Preston v. Neele* (1879), 12 Ch. D.

760, 768; *In re Grant, Walker v. Martineau* (1883), 52 L. J. Ch. 552; *In re Bacon, Grissel v. Leathes* (1893), 62 L. J. Ch. 445; Armour on Real Property, p. 113; Coote on Mortgages, 5th ed., p. 955; and as to her liability for waste, to *In re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532; *Whitham v. Kershaw* (1885), 16 Q.B.D. 613.

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D. J. Donahue, K.C., for the plaintiff, as to the liability for waste, cited *Pardoe v. Pardoe* (1900), 16 Times L.R. 373; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *Drake v. Wigle* 24 C. P. 405; *Saunders v. Breake* (1884), 5 O.R. 603; *Lewis v. Godson* (1888), 15 O.R. 252; *Clow v. Clow* (1883), 5 O.R. 355; as to the right of subrogation: *Reid v. Reid* (1881), 29 Gr. 372; and as to the right to cut timber when security insufficient: *Brethour v. Brooke*, 23 O.R. 658.

Robinson, in reply, referred to Bewes on Waste, 1894 ed., p. 143.

February 28. The judgment of the Court was delivered by STREET, J. [after setting out the facts as above]:—I think *Yates v. Yates* (1860), 28 Beav. 637, is not distinguishable in principle from the present case. There it was held that the periodical payments of an annuity charged on land by the testator in favour of his widow should be apportioned between the value of the life estate and the value of the reversion. In other words, the annual payments are to be treated partly as interest which the tenant for life is to pay, and partly as principal for which he will have a charge upon the inheritance. The cases upon the subject are collected and discussed in *In re Muffett; Jones v. Mason* (1888), 39 Ch. D. 534.

We have not before us a basis upon which to work this calculation out exactly for the purpose of ascertaining the share of the debt for which the defendant Reece is entitled to a charge. It is sufficiently plain, however, I think, that taking the value of the land at the testator's death at \$2,500, which is the value placed on it by many witnesses, the security for the sums paid by the defendant Reece beyond her proportionate share cannot be said to be inadequate so as to entitle her to cut down the timber under the authority of *Brethour v. Brooke*, 23 O.R. 658.

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I find no reason, therefore, to dissent from the conclusion at which the Chief Justice arrived as to the liability of the defendant Reece for the acts complained of. I quite concur in the finding that these acts were not done for the purpose of clearing the land for cultivation, and the result of them has been undoubtedly greatly to diminish the value of the property. The amount found payable in respect of the damage is not, in my opinion, excessive.

We think, however, that it will probably be in the interests of all parties that, instead of the payment into Court of the sum of \$400, as directed by the judgment under appeal, to remain there during the life of the defendant Reece, she receiving the interest meantime, she should at once pay to the plaintiffs the present value of that sum, which we calculate at \$180, and we vary the judgment to that extent only.

Any rights the defendant Reece may have to recover the sums, if any, which she has paid upon the amounts beyond her due proportion, must be enforced in another action. They form no defence to the claim of the plaintiffs here, and no relief by way of counterclaim in respect of them has been sought.

The appeal must, therefore, be dismissed with costs.

A. H. F. L.

[STREET, J.]

PERRY v. CLERGUE.

1903

Jan. 29.

Constitutional Law—British North America Act—Ferries—Dominion and Provinces—Jura Regalia—Public Harbours—River Improvements—62-63 Vict. ch. 50, sec. 9 (c) (D.)—R.S.C. ch. 97, sec. 11—B.N.A. Act, secs. 91 (13), 102, 108, 109, 117.

The right to create and license a ferry, having been one of the *jura regalia*, or royalties which belonged to the several Provinces at the Union, continued to belong to them after Confederation, as declared by sec. 109 of the B.N.A. Act, notwithstanding sec. 91, sub-sec. 13, giving the Dominion legislative power in relation to ferries; and therefore a lease of a ferry between the town of Sault Ste. Marie in the Province of Ontario, and the town of Sault Ste. Marie in the State of Michigan, U.S.A., granted by the Dominion Government, was declared to be invalid.

Held, also, that even if the St. Mary's River at the point in question were a public harbour, yet this would not give the Dominion Government any right to grant any exclusive right over it, such as the ferry in question.

Held, however, that the St. Mary's River at the point in question is not a public harbour. Something more is necessary to convert an open river front into a public harbour, within the meaning of sec. 108 of the B.N.A. Act, than the erection along it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods.

Held, also, that the existence of improvements belonging to the Dominion Government in the river bed in front of the town of Sault Ste. Marie afforded no reason for the entire control of the ferry across the river being held to be in the Dominion Government, though the Dominion Parliament or Government have undoubtedly a right to make laws or rules with regard to the ferry in question, or other ferries, for the purpose of regulating them and of preventing them from interfering with public harbours and river improvements of the Dominion.

The Dominion statute incorporating the Algoma Central and Hudson Bay Railway Company, authorizes it for the purposes of its undertaking to acquire and run steam and other vessels for cargo and passengers upon any navigable water which its railway may connect with:—

Held, that under the very large and general words of this clause the railway company was not bound to restrict the passengers and cargo transported by its vessels to persons and goods intended to be carried on its railway line.

Semble, also, that on proper construction of the Dominion Act respecting ferries, R.S.C. ch. 97, sec. 11, any vessel which is regularly entered or cleared by the officers of His Majesty's Customs at any port in Canada, may convey passengers and goods for hire and profit, notwithstanding that an exclusive right of ferry has been granted within the limits within which it does so.

THIS action was brought by the plaintiffs to restrain the defendants and each of them from infringing upon the exclusive right claimed by the plaintiff Perry to a ferry between the town of Sault Ste. Marie in the Province of Ontario and the town of Sault Ste. Marie in the State of Michigan, across the St. Mary's River, which passes between those places, and for damages.

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The plaintiff Perry claimed the right to this ferry and to prevent the defendants from ferrying persons across the river from any point in the Canadian town of Sault Ste. Marie to any point in the American town of the same name, under and by virtue of a lease made to him in the name of Her late Majesty Queen Victoria by the Government of the Dominion of Canada, dated May 21st, 1897, of "Our ferry across the St. Mary's River between the town of Sault Ste. Marie in the Province of Ontario, and the town of Sault Ste. Marie in the State of Michigan, one of the United States of America, to have and to hold the said ferry with all its rights and appurtenances unto the said lessee, his executors, administrators and assigns" for the term of nine years from May 1st, 1897, at the annual rent of \$100, subject to the conditions thereafter set forth. In one of these conditions it is provided that "the limits of the ferry shall be coterminous with the limits of the town of Sault Ste. Marie, Ontario, to a point in the town of Sault Ste. Marie, Michigan, to be fixed by the municipal authorities of that place."

It was admitted that the defendants, the Algoma Central and Hudson Bay R.W. Co. had, since the month of August, 1902, been running a steamboat regularly every half-hour from their dock within the limits of the town of Sault Ste. Marie, Ontario, across the St. Mary's River to a point in the American town and had advertised it as a ferry; they denied the plaintiffs' title to the ferry claimed by them, and claimed the right to run this steamer under one of the provisions of their charter as a railway company. The other defendants denied the plaintiffs' title to the ferry, and also denied having violated the right claimed by the plaintiffs if it existed.

The action was tried before STREET, J., at the winter assizes at Sault Ste. Marie, on December 18th, 1902, and argued at Toronto, on January 5th, 1903.

G. H. Watson, K.C., for the plaintiff contended that the Dominion Government had jurisdiction over the grant of ferries; and relied on the Dominion jurisdiction over harbours and rivers and lake improvements: British North America Act, sec. 91,

sub-sec. 13, sec. 108; *Attorney-General for Dominion of Canada v. Attorney-General for Ontario* (the Fisheries case), [1898] A.C. 700; *Holman v. Green* (1881), 6 S.C.R. 707; and that the Algoma Central and Hudson Bay R.W. Co. had not the right under the statutes relating to it to run the ferry as they were doing: 62 Vict. ch. 92, secs. 2, 45 (O.); 63 Vict. ch. 30 (O.); 1 Edw. VII. ch. 12, sec. 25 (O.); 62-63 Vict. ch. 50, sec. 9 (D.); 63-64 Vict. ch. 49 (D.); 1 Edw. VII. ch. 46 (D.); *In re Cuno, Mansfield v. Mansfield* (1889), 43 Ch. D. 12, 17; *Fitch v. New Haven, New London and Stonington R.W. Co.* (1861), 30 Conn. 38; *The Maverick* (1842), 1 Sprague 23; *Vyner v. Mersey Docks and Harbour Board* (1863), 14 C.B.N.S. 753, 812; *Hardcastle on Statutes*, 3rd ed. p. 130.

W. Nesbitt, K.C., and *J. E. Irving*, for the defendants, contended that a grant of a ferry must be strictly construed, and not as exclusive, unless expressly so stated on its face, and disputed the plaintiffs' right of action.

W. R. Riddell, K.C., for the Province of Ontario, contended that the Dominion had no right to grant a lease of a ferry; that this was a matter of Provincial jurisdiction: *British North America Act*, secs. 91, 108, 109, 117; *Attorney-General for Dominion of Canada v. Attorney-General for Ontario* (Fisheries case), [1898] A.C. 700; that the *locus in quo* here was not a public harbour, and that a private wharf or harbour did not pass to the Dominion under the *British North America Act*: *Queen v. St. John Gas Light Co.* (1895), 4 Ex. C.R. 326; *McDonald v. Lake Simcoe Ice and Cold Storage Co.* (1899), 26 A.R. 411; *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 App. Cas. 295, 305; *Great Western R.W. Co. v. Swindon and Cheltenham Extension R.W. Co.* (1884), 9 App. Cas. 787, 802, 804; *Queen v. Moss* (1896), 26 S.C.R. 322; *Central Vermont Railway v. The Town of St. Johns* (1887), 14 S.C.R. 288, 307; that *jura regalia* included rights of ferry: *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767; *Barthel v. Scotten* (1895), 24 S.C.R. 367; *Ontario Mining Co. v. Seybold*, [1903] A.C. 73.

Watson, in reply.

No one appeared on behalf of the Dominion of Canada, though notified.

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January 29. STREET, J. [After stating the facts as above]:—The plaintiffs have failed to shew that the defendants, other than the Algoma Central and Hudson Bay R.W. Co., have done anything to interfere with the right they claim to an exclusive ferry at the point in question. The defendants the railway company have run the steamer "Fortune" as a ferry from their railway dock to a point on the American side of the river in the town of Sault Ste. Marie, Michigan, and are alone liable, if anyone is, for what has been done. As against the defendants other than the railway company, therefore, the action must clearly be dismissed.

Various defences are set up by the defendants the railway company in bar of the plaintiffs' right to maintain this action: the first of these which I shall proceed to consider is that which denies that the Dominion Government ever became entitled to the right to grant a license to the plaintiff Perry of an exclusive right to the ferry in question, and asserts that the right to create and license ferries exists in the Provincial and not in the Dominion authorities.

The right to create and license a ferry is classed by Mr. Sergeant Stephen, 12th ed. Commentaries, Vol. 1, p. 608, under the head of Franchises or Liberties, which are a species of incorporeal rights or hereditaments, and a branch of the Royal prerogative. See also *Blissett v. Hart* (1744), Willes 508; *Dyke v. Walford* (1846), 5 Moo. P. C. 434, at p. 480; *Attorney-General v. Simpson*, [1901] 2 Ch. 671, 717, 718; *Newton v. Cubitt* (1862), 12 C.B.N.S. 32.

The right of the Crown to grant a ferry appears, therefore, to have been a branch of the *jura regalia*, with which the word "Royalties" in its natural sense, is synonymous. It may, I think, be assumed that the beneficial interest in this right after the confirmation of the Act 9 Vict., ch. 114 of the late Province of Canada by the Imperial Act 10 & 11 Vict. ch. 71, and Order-in-Council, thereafter belonged to the Province, although the right has always continued to be exercised in the name of Her Majesty.

Under various statutes of the Province of Canada, which were consolidated in chapter 46 of the Consolidated Statutes of Upper Canada, the exercise of the right was dealt with and

regulated. It was shewn by the evidence given in the present case that between 1842 and 1866 some thirty-four grants or licenses were issued. The exercise of the power extended to ferries between Upper Canada and the United States as well as to those within the limits of the Province.

In the B.N.A. Act, sec. 91, sub-sec. 13, exclusive legislative authority is given to the Parliament of the Dominion over "ferries between a Province and any British or foreign country, or between two Provinces," but it is now well established that the exclusive right of legislation over a particular class of matters does not necessarily carry with it any right of ownership in them: *Att.-General for Dominion of Canada v. Att.-General for Ontario*, [1898] A.C. 700. The ownership of the property and assets which belonged to the various Provinces at Confederation is declared and provided for by the sections of the B.N.A. Act, beginning with sec. 102. It appears to me that in considering the right here in question the only sections necessary to be considered are 102, 108, 109 and 117.

Section 102 provides that "All duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick before and at the union had and have power of appropriation except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces . . . shall form one Consolidated Revenue Fund to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided."

If the revenue derived from ferries by means of the licenses issued from time to time in the name of Her Majesty by the Government of the Province of Canada before Confederation is to be treated as coming within this section, then it must follow that the right to create and grant ferries passed at Confederation to the Dominion and can now be exercised by its Government. But that construction carries to the Dominion the right of ownership not only in ferries along the border between Canada and the United States, and between the Provinces, but also the right to all the internal ferries of the different Provinces as well, at Toronto, Montreal and Quebec, as well as those at Sault Ste. Marie, Windsor and Sarnia, because all ferries in the Province of Canada were in the same legal

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position down to Confederation—they were all licensed in the name of Her Majesty by the Government of the Province; the revenue derived from them all went into the Consolidated Fund of the Province, and all must pass together to the Dominion, if treated as coming under sec. 102.

Internal evidence is not wanting in the B.N.A. Act, I think, to shew that it was not contemplated that the right to all ferries should pass to the Dominion. Had that been the intention it is in the highest degree improbable that the power to legislate given to the Dominion Legislature by sub-sec. 13 of sec. 91 would have been limited as it is to “ferries between a Province and any British or foreign country or between two Provinces.”

This difficulty is sufficiently formidable in my opinion to require sec. 102 to be construed as not including ferries of any description or the revenues derived from them, especially if language sufficient to support that construction is found in another section of the Act.

Section 109 provides that “All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union . . . shall belong to the several Provinces . . . in which the same are situate or arise,” etc.

The question was much discussed in the case of *The Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767, at p. 778, by the Privy Council, as to the meaning to be attached to the word “royalties” in this section; and the same question again arose in *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 App. Cas. 295, the British Columbia mines case, and is discussed at p. 304. It was found unnecessary for the decision of the points involved in these cases to determine the question; but in each of them a strong expression of opinion is to be found in favour of giving to the word its natural and large sense of *jura regalia* or *regalitates*, that is to say the prerogative rights of the Crown and the revenues derived from them, and not restricting it to a payment or percentage upon the product of mines by the application of the rule *noscitur a sociis*.

In the *British Columbia Mines* case, at p. 302, the Court draw a broad distinction between the ordinary territorial revenues of the Crown and those derived from its prerogative rights, holding that the latter remain the property of the Province which originally was entitled to them, unless they are taken away by express language. I think I am right in saying that the prerogative rights of the Crown from which its revenues, other than ordinary territorial revenues, were derived, continued to subsist notwithstanding the temporary surrender of the revenues to the authorities of Canada by the Imperial Act 10 & 11 Vict. ch. 71; and they are not, therefore, inaptly described as royalties when we consider that the aim of the framers of the B.N.A. Act appears to have been to use wide and general language in dividing the assets and property dealt with by it, the general scheme of division having first been arrived at.

I am, therefore, of opinion that the right to create and license ferries on as well as within the borders of the Provinces passed under the B.N.A. Act to the Provinces and not to the Dominion. The objection that the Dominion Parliament is given exclusive legislative powers over those on the borders is, I think, rather an argument in favour of this view, and certainly under the authorities not inconsistent with it. It is no argument against the ownership by the Province of both classes of ferries that the Dominion Legislature should have legislative control over that class of them with which the rights of foreign countries and of the Provinces *inter se* may be concerned; it would be, on the other hand, difficult to conceive that the Act intended to give the Dominion both classes of ferries with legislative control over only one of them. It would be easier, I think, to treat the right in question as remaining under the 117th section of the Act in the Provinces as property not otherwise disposed of by the Act than as passing to the Dominion under the 102nd section.

A further argument advanced was that the St. Mary's river at the point in question was a public harbour and passed, under the 108th section of the Act, to the Dominion as far as the centre of the river where the international boundary was. Even if it be a public harbour, and therefore the property of

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the Dominion, I see no reason for thinking that the Dominion Government have therefore the right to grant any exclusive right over it, such as is here claimed. The river at that point varies from 3,800 feet to 2,500 feet, or thereabouts, in width, and was at the time of the union merely an open river channel in front of the town with one small private wharf running 200 or 300 feet into the river used for the loading and unloading of vessels. This wharf, known as Plummer's Wharf, was purchased by the Dominion Government in 1888, and has not been substantially changed or enlarged. Since 1867 some four other private wharves have been built at points in front of the town, and the Government has constructed a ship canal into Lake Superior and has dredged a channel some 300 feet in width along the front of the town as far as the Government, or Plummer's, wharf for the use of vessels using the canal. Vessels intended to go through the canal into Lake Superior, or having come down from Lake Superior, are informed by a Government weather signal office of the state of the weather above and below the town, and frequently anchor in the river awaiting favourable weather before proceeding on their voyage. There is a space of several hundred feet between the outer limit of the channel dredged by the Government and the centre of the river. Beyond the slight protection from a storm which might be obtained from lying on the lee side of a narrow wharf there is nothing in the way of artificial protection afforded to vessels. The wharves, other than Plummer's wharf, are all owned by private individuals. It is difficult to say what it is that constitutes a harbour, but in my opinion something more is necessary to convert an open river front into a public harbour within the meaning of the B.N.A. Act than the erection along it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods.

The existence of the improvements made in the river bed in front of the town by the dredging operations carried on by the Dominion Government for the purpose of deepening the channel leading to and from the ship canal were also urged as a reason why the entire control over the ferry across the river should be held to be in the Dominion Government. I am unable

to see that either the existence of a harbour belonging to the Dominion Government, which does not involve an ownership of the soil under the water, or the ownership of the river improvements, gives to the Dominion Government any right to grant a ferry which did not exist apart from them. They have undoubtedly a right to make laws with regard to this and other ferries for the purpose of regulating them and of preventing them from interfering with the public harbours and river and lake improvements of the Dominion, and they have the exclusive right to legislate with regard to lines of steamships connecting this Province with the United States, but the right to create and grant the right to a ferry as such seems, for the reasons I have given, to be a right which belongs to the Provincial and not to the Dominion authorities, however much the exercise of the right may be controlled and regulated by enactments within the legislative authority of the Dominion.

The defendants the Algoma Central and Hudson Bay Railway Company, however, do not rest their defence entirely upon the claim that the Dominion Government had no right to grant an exclusive right of carrying passengers between the town of Sault Ste. Marie, Ontario, and the American town of the same name. They claim the right to ply between their own dock at the terminus of their line on the river on the Canadian side at Sault Ste. Marie and the American side of the river under subsec. (c) of sec. 9 of ch. 50, 62-63 Vict. (Dominion statute), being their Act of Incorporation as "The Algoma Central Railway Company," a name which by sec. 1, ch. 46, 1 Edw. VII. is changed to "The Algoma Central and Hudson Bay Railway Company." Section 9 of ch. 50 above mentioned provides that 'The company for the purposes of its undertaking may . . . (c) acquire and run steam and other vessels for cargo and passengers upon any navigable water which its railway may connect with.' It has been shewn in evidence that the steamer "Fortune" has been purchased and is now being run by the defendants the Algoma Central, etc., Railway Company from their dock, which is the terminus of their line, to a landing place on the American side of the river. It has been further shewn that although the "Fortune" makes half-hourly trips during the daytime when the river is free from ice, she is

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regularly entered and cleared by the officers of His Majesty's Customs each time that she touches at and leaves her dock on the Canadian side.

It is answered by the plaintiff that this steamer is not in good faith run by the railway company for the purposes of its undertaking, because the line is only constructed some seventy miles inland and at present terminates there in a country where there are no towns or villages and few inhabitants; and that a half-hourly service cannot be required for the purposes of its undertaking at present, there being only one train a day over the line.

In my opinion the defendants the railway company must succeed upon the defence here set up, as well as upon the first ground above discussed, for the reasons following: They are authorized to acquire and run steam vessels for the purposes of their undertaking; the words of the statute giving them this authority are very large and general. It is clear that the railway company is not bound to restrict the passengers and cargo transported by its vessels to persons and goods intended to be carried upon its railway line, and once this is conceded it is impossible to say that they must draw the line and refuse some particular proportion of passengers and goods. If it be assumed that the lease of the ferry from the Dominion to the plaintiff Perry conferred upon him the rights he claims, there might be difficulty in construing the clause in the railway company's charter, which is subsequent in date to it, in such a way as to derogate from the vested rights acquired by the plaintiff under the lease, were it not for the 8th and 11th sections of the Dominion Act, R.S.C., ch. 97, under which the plaintiff's lease was granted. The 8th section imposes a penalty not exceeding \$20 upon every person who interferes with the rights of a licensed ferryman by conveying passengers or goods for hire or profit, or with intention to lessen the tolls or revenue of any ferry, within the limits assigned to such ferryman by the Crown. The 11th section provides that "nothing in this Act shall extend to the owner or master of any vessel plying between two ports in Canada, *or regularly entered or cleared by the officers of Her Majesty's Customs at any such port,*" etc., etc.

I must assume, although no order or regulation was proved to that effect, that the limits of the ferry established at Sault Ste. Marie were coterminous with the limits of the Canadian town as described in the lease itself. A license and not a lease is that which the Act, R.S.C. ch. 97, authorizes, and the lease cannot give the grantee anything more than a license would have given him. There is nothing in the Act to protect the ferryman against competition, or to shew that the right given was to be a monopoly or exclusive right, beyond the fact that it is a ferry which is the subject of the license, and beyond the 8th section of the Act itself which provides for the punishment by fine of persons who convey passengers or goods for profit within the limits of the ferry. Any exclusive right implied from the fact that it is a ferry which is the subject of the license, and that limits are fixed for the ferry, cannot be stronger than if the Act had itself expressly declared that the right granted should not be interfered with by other persons plying vessels for the carrying of passengers and goods within those limits.

Under these circumstances what is the meaning to be attached to the 11th section of the Act? It seems to be capable of only one meaning so far as I have been able to discover, viz., that any vessel which is regularly entered or cleared by the officers of His Majesty's Customs at any port in Canada may convey passengers and goods for hire and profit, and with the intention to lessen the tolls and revenue of the ferry, notwithstanding anything in the Act contained, that is to say, notwithstanding that an exclusive right of ferry within those limits has been granted. This provision first appears as sec. 10 of 33 Vict. ch. 35, (Dominion Statutes of 1870), and it follows immediately after the clause which is now consolidated as sec. 8 of R.S.C. ch. 97. It was clearly intended to exempt from the penalties imposed by the preceding section, now sec. 8, the owners of vessels entered and cleared by the Customs at any Canadian port, and it is wide enough to exempt the owners of such vessels from being held in any way liable for interfering with any licensed ferryman.

The licensee takes his license subject to all the provisions of the Act under which it is granted and this is one of them.

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The cases following are examples of the rule that in a bargain between grantees of public rights and the public the terms of the bargain must be clearly found in the Act under which they are granted: *The Kingston-upon-Hull Dock Co. v. La Marche* (1828), 8 Barn. & Cress. 42; *The Proprietors of Stourbridge Canal v. Wheeley* (1831), 2 B. & Ad. 792; *Abergavenny Improvement Commissioners v. Straker* (1889), 42 Ch. D. 83; or as it is put in *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge* (1837), 11 Peters, 420, "In grants by the public nothing passes by implication."

Now it is proved here, as I have already said, that the "Fortune" has been regularly entered as an incoming vessel and cleared as an outgoing vessel at His Majesty's Customs at Sault Ste. Marie upon every one of her trips; the Customs House collector was present in Court and gave this evidence and had the packages of entries and clearances with him to shew the fact. I am of opinion, therefore, upon this ground also, that the plaintiff is not entitled to any relief against the defendants the railway company.

Upon both grounds, therefore, I am of opinion that the action must be dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

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THE MUNICIPAL CORPORATION OF THE TOWN OF OWEN SOUND.

March 6.

Costs—Municipal Act, R.S.O. 1897, ch. 223, sec. 470—Trespass—Compensation—Powers of Trial Judge.

Section 470 of the Municipal Act, R.S.O. 1897, ch. 223, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality."

In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work :—

Held, that section 470 did not apply as the plaintiff's claim was for trespass and not for negligence, and that the trial Judge had full power over costs.

Judgment of Ferguson, J., affirmed.

APPEAL, upon the question of costs, from the judgment of Ferguson, J., before whom the action was tried without a jury, at Owen Sound, on 1st July, 1902, and who had given the plaintiff the costs up to the trial.

The facts are set out in the judgment of Street, J., in the Divisional Court.

The appeal was argued March 4th, 1903, before a Divisional Court composed of FALCONBRIDGE, C. J. K. B., STREET and BRITTON, JJ.

Shepley, K.C., for the appeal. The granting of the costs to the trial was an error, and a question of principle is involved. The Judge held that the plaintiff was entitled to recover by action, and was not obliged to arbitrate, and ordered a reference as to the damages, gave costs up to the trial, and reserved further directions and subsequent costs. He should have reserved all the costs, as the defendants paid money into Court with their defence, and therefore if the plaintiff fails to recover any greater sum than that paid in, he must, under section 470* of the Municipal Act, bear all the costs of the action.

*470. The council of any municipality, upon any claim being made or action brought for damages for alleged negligence on the part of the municipality, may tender, or pay into Court (as the case may be) such amount as they may consider proper compensation for the damage sustained ; and in the

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J. H. Moss, contra. The action is one for trespass, and section 470 of the statute does not apply, and the Judge performed a duty in disposing of the costs. There is no appeal on a mere question of costs.

Shepley, in reply.

March 6. The judgment of the Court was delivered by STREET, J.:—The action is brought by the plaintiff against the defendants, the municipal corporation of the town of Owen Sound, for damming a stream, and thereby diverting its waters upon his land, and causing him damage.

The fact of the diversion of the stream and of damage to the plaintiff was shewn, and by consent, the trial Judge having found that the plaintiff was entitled to proceed by action, and not for compensation, under the Municipal Act, the question of damage was referred to His Honour Judge Creasor.

Upon settling the judgment, a question has arisen as to whether the trial Judge had discretion to deal with the costs.

The defendants had paid into Court \$50 by way of amends, and the plaintiff had refused to accept the amount in satisfaction of his claim.

The defendants contend that the Judge, under section 470 of the Municipal Act, was bound to reserve the question of costs until the result of the reference should be known, instead of giving to the plaintiff the costs of the action to the trial at once, as he has done, and only reserving subsequent costs and further directions.

In my opinion, the case does not fall within section 470. That section applies only to actions brought to recover damages "for alleged negligence on the part of the municipality." Here the municipality acted without a by-law; they had, therefore, no right to do the act complained of, and are liable to an action for doing it, because it was a trespass. It is not for doing a rightful act negligently that the action is brought, but for doing a wrongful act, and the section, therefore, does not apply.

The plaintiff should have the costs of the present application. event of the non-acceptance by the claimant of such tender or of the amount paid into Court, and of the action being proceeded with, and no greater amount being recovered than the amount so tendered or paid into Court, the costs of suit shall be awarded to the defendants, and set off against any amount recovered against them.

G. A. B.

[IN CHAMBERS.]

LIDDIARD V. THE TORONTO RAILWAY.

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Feb. 18.

Parties—Joinder of Plaintiffs—Amendment—Con. Rules 185 and 206.

Con. Rule 206 is to be read in connection with Con. Rule 185 and parties to an action who might have been joined under the latter may be added by way of amendment under the former.

In an action brought against a street railway company for damages for running an electric car into and colliding with the plaintiff and his horse and waggon in which his son was seated with him, who was also injured :—*Held*, that the son should be added as a party plaintiff by his father as next friend in an action already commenced by the father alone.

THIS was an application to add one Edward Liddiard, the son of George Liddiard, as a party plaintiff by his father, as his next friend, in an action already commenced by the father.

The motion was argued before Mr. Winchester, the Master in Chambers, on the 18th of February, 1903.

J. E. Cook, for plaintiff.

James Bain, for defendants.

February 18. THE MASTER IN CHAMBERS:—This is an application to add one Edward Liddiard, the son of the present plaintiff, by his father, as next friend, as a co-plaintiff to this action.

The action is brought to recover damages from the defendants alleged to have been caused to the plaintiff and his horse, waggon, etc., by the negligence of the servants of the defendant company in running one of the company's electric cars into and colliding with the plaintiff and his horse and waggon.

It appears that the plaintiff's son was riding on the waggon in question, by the side of his father, and received serious bodily injury by reason of the collision.

It is sought to add him as a plaintiff to this action that he may recover damages for his injuries.

The motion is opposed by counsel for the defendant company on the ground that the son has a distinct cause of action, if any, and it is therefore improper to embarrass the defendant company by two actions in one.

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When the motion was first made, counsel supporting it relied upon Rule 206 as entitling him to the order; but it appearing that that rule did not fully cover the case in question, the application stood over until this morning, when Rule 185 was relied upon.

That rule provides that "All persons may be joined in an action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or occurrence, or series of transactions or occurrences is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions, any common question of law or fact would arise; . . ."

Rule 206, which provides for the adding of parties, is to be read in connection with the above Rule 185: *Edwards v. Lowther* (1876), 24 W.R. 434; and any person who might have been joined originally under Rule 185 may be added under Rule 206: *Smith v. Haseltine* (1875), W.N., p. 250; *Long v. Crossley* (1879), 13 Ch. D. 388.

The facts stated in the plaintiff's material in support of this application shew that the right to the relief claimed arose out of the same transaction or occurrence, and that there is a common question of fact or law, and that brings the case within the provisions of the rule: *Stroud v. Lawson*, [1898] 2 Q.B. 44; *The Universities of Oxford and Cambridge v. Gill*, [1899] 1 Ch. 55; and *Walters v. Green*, [1899] 2 Ch. 696.

Upon filing the consent of the proposed plaintiff and his father, as next friend, the order will go adding him as party suing by his next friend. The costs of the application and amendment will be to the defendant company in any event.

G. A. B.

[STREET, J.]

REX V. MULLEN ET AL.

1903

March 2.

Criminal Law—Crown Case Reserved—Application for—Grounds—Misapprehension of Jurors—Statements by.

It is no ground for stating a reserved case, after a trial and conviction, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; it is contrary to principle to allow the statements of jurors, even under oath, to be used for the purpose of an application for a reserved case.

THE defendants were tried before STREET, J., at the Ottawa Winter Assizes on the 21st January, 1903, and convicted of an assault occasioning actual bodily harm. They were represented by counsel, who was present when the jury returned their verdict, and who addressed the Judge on their behalf on the 24th January, 1903, for the purpose of obtaining a lenient sentence upon them for their offence.

On 27th February, 1903, an application was made to STREET, J., by letter from *G. S. Henderson*, as counsel for the defendant Murphy, accompanied by the following affidavit, to state a reserved case under sec. 743, sub-sec. 2, of the Criminal Code:—

“I, Gordon Smith Henderson, of the city of Ottawa, in the county of Carleton, barrister-at-law, make oath and say:—

“1. That I was and am counsel for William Murphy herein.

“2. That the prisoners were tried on the 21st day of January, 1903, before the Honourable Mr. Justice Street and a jury, at the January Assizes in and for the county of Carleton.

“3. That the jury were out two hours and fifty minutes considering the verdict herein, and then found the prisoners guilty, and they were sentenced on the 24th of same month.

“4. That the jury were not polled.

“5. That James E. Macpherson, one of the jurors herein, was not in favour of the verdict of guilty, and so informed me, but that he and another juror, who was also for an acquittal, were led to believe by other jurors and the constable in charge, that ten were sufficient to convict.

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"6. That the said James E. Macpherson on or about the day of the conviction expressed himself, upon learning that the jury must be unanimous in criminal cases, that a mistake had been made, to Mr. Edmund F. Burritt, of Code & Burritt, barristers, who spoke to Police Magistrate Smith of the county of Carleton, who communicated with me, whereupon I immediately in person verified the said James E. Macpherson's statement and notified the department of justice."

March 2. STREET, J. (after setting out the facts as above): —I see no ground upon which I can state a reserved case. I am not aware of any question of law having arisen in the case. What is alleged is, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; but it is contrary to principle to allow the statements of jurors, even under oath, to be used for a purpose such as is here proposed: *Jackson v. Williamson* (1788), 2 T.R. 281.

In my opinion, it would be an extremely dangerous practice to permit the verdict of a jury to be disturbed in the manner or for the reasons here suggested, and I therefore refuse to state or reserve any case.

T. T. R.

[BRITTON, J.]

FLETT V. COULTER.

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Feb. 17.

Negligence—Horse on Highway—Injury to Boy—Contributory Negligence.

Defendant's horse was on the highway, having escaped from a field which was fenced in, when a boy of twelve years of age tried to catch him by taking hold of a rope then around his neck, and in doing so he was kicked and injured. There was no evidence either that the defendant knew the horse was accustomed to stray or had any vicious propensity, or had any such fault, and there was evidence that it had been interfered with by several boys, of whom the injured boy was one, and that the latter had more than ordinary intelligence, and fully understood the risk he ran.

In an action for the injury by the boy and his father :—

Held, that they could not recover.

Patterson v. Fanning (1901), 2 O.L.R. 462, distinguished.

THIS was an action brought by a boy of about twelve years of age and his father for injuries done to the boy, who was kicked by a horse belonging to the defendant, under the circumstances set out in the judgment.

The action was tried at the assizes held in Toronto on the 27th January, 1903, before BRITTON, J., and a jury.

It appeared that the defendant's horse had been pastured in a field which was fenced, and from which he had escaped to a highway in the city of Toronto; the plaintiff alleging, because of the fence having been broken; and the defendant alleging because the gate had been opened and the horse driven out by some boys, of whom the plaintiff was one. There was evidence that the horse had been chased by the boys, and that when the plaintiff approached him he was kicked and injured.

At the close of the plaintiff's case, defendant's counsel moved for a nonsuit, but the Judge allowed the case to go to the jury as to certain questions, and reserved the right to dispose of the action later, on motion for a nonsuit.

The jury found that the horse had escaped from the field because of a defect in the fence, but that the plaintiff was guilty of contributory negligence in doing what he did when he was injured, and assessed the damages at \$20.

The motion for a nonsuit was renewed and argued on the 3rd February, 1903.

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S. B. Woods, for the defendant. Where one party by improper conduct makes it impossible for the other, even when the latter is acting improperly, to avoid doing him damage, the one inflicting the injury is not liable, because the negligence of both concurred in causing the injury: *Hawkins v. Cooper* (1838), 8 C. & P. 473; *Pluckwell v. Wilson* (1832), 5 C. & P. 375; *Bird v. Sharp* (1853), noted in *Oliphant on Horses*, 5th ed., p. 301; *Tuff v. Warman* (1858), 27 L. J. C. P. 322. The infant plaintiff has been found guilty of contributory negligence, and is not relieved by reason of his tender years. *Lynch v. Nurdin* (1841), 1 Q. B. 29, does not apply, because the
 * infant plaintiff was guilty of an intentional trespass, not mere negligence: Clerk & Lindsell's *Law of Torts*, p. 386; *Hughes v. Macfie* (1863), 33 L.J. Ex. 177; *Mangan v. Atterton* (1866), L.R. 1 Ex. 239; *Lygo v. Newbold* (1854), 9 Exch. 302, per Pollock, C.B., at p. 305; *Mann v. Ward* (1892), 8 Times L.R. 699. Where damage is done in consequence of a person striking a horse, on which another is riding, the striker is the trespasser, not the rider: *Gibbon v. Pepper* (1696), 2 Salk. 637; *Tolhausen v. Davies* (1888), 58 L.J.Q.B. 98; *Batchelor v. Fortesque* (1883), 11 Q. B. D. 474. The plaintiff was not entitled to have his case left to the jury without giving evidence of negligence: *Hammack v. White* (1862), 11 C.B.N.S. 588; *Toomey v. The London, Brighton and South Coast R.W. Co.* (1857), 3 C.B.N.S. 146. The defendant is not liable unless scienter be shewn: *Oliphant*, p. 329.

J. G. O'Donoghue, for the plaintiff. There was no necessity to shew scienter in view of the by-law of the city of Toronto proved at the trial: *Patterson v. Fanning* (1901), 2 O. L. R. 462. Judgment should be entered for the plaintiff on the answers of the jury, as contributory negligence by an infant is no defence: *Ricketts v. The Corporation of the Village of Markdale* (1900), 31 O. R. 610; *Lynch v. Nurdin*, 1 Q. B. 29; *Merritt v. Hepenstal* (1895), 25 S.C.R. 150; *T. Eaton & Co. v. Sangster* (1895), 24 S. C. R. 708; *Gardner v. Grace* (1858), 1 F. & F. 359. There should not be a nonsuit. The power of the Judge to nonsuit for contributory negligence is restricted to cases where it is indisputable that the injury complained of would not have happened but for plaintiffs own want of proper

care: *Scrivner v. Lowe* (1900), 21 C.L.T. Occ. N. 27. There was an invitation here to the child to play where he was hurt: *Smith v. Hayes* (1898), 29 O.R. 283, at p. 289. The finding of the jury only amounted to a finding that the boy was rather officious.

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February 17. BRITTON, J.:—An action by the boy, Hugh Flett, and his father, for damages resulting to the son Hugh from the kick by a horse owned by defendant, on 12th May last.

At the close of the plaintiff's case, a nonsuit was moved for on the ground that there was no evidence upon which defendant could be held liable.

I reserved my decision upon the point, and the defendant called witnesses.

At the close of the case the defendant renewed his objections, and asked that the case be not submitted to the jury.

I submitted certain questions to the jury, asking for their answers upon the evidence, reserving to myself, however, to dispose of the case upon all the evidence and upon the answers by the jury.

A great many cases were cited by counsel, and I have read most of them with care. Apart from the question of contributory negligence on the part of the boy Hugh, I do not think the plaintiffs are entitled to recover.

The horse was a quiet one. There was not a particle of evidence to shew that the defendant knew of the horse being accustomed to stray, or that he had any vicious propensity, nor is the horse shewn to have had any such fault. Even if the horse got out of the pasture by reason of a defective fence, what occurred is not the reasonable result of this horse getting upon the highway.

Patterson v. Fanning, 2 O.L.R. 462, was relied on by the plaintiffs. That is an entirely different case. That case decides that the owner of a horse, straying or trespassing, is liable for the ordinary consequences of that trespass. Mr. Justice Osler says, on page 463: "The case is different, in my opinion, from that of a horse biting or kicking a person on the street under such circumstances."

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In this case the negligence, even if any is proved, is not connected with the damage complained of. In *Patterson v. Fanning*, Mr. Justice Osler approves of the remark of Erle, C.J., in *Cox v. Burbidge* (1863), 13 C.B.N.S. 430: "Everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway:" pp. 464, 465: and he proceeds to say: "Therefore, in the absence of knowledge on the part of the owner of the vicious nature of the animal, he would not be liable for a sudden act of a fierce and violent nature, contrary to its usual habits:" p. 465.

As to the contributory negligence on the part of Hugh Flett, this is not at all the case of a very young child going in the way of, or near to, a horse on the highway. It is different from a child going near to a dangerous machine, or picking up a substance, the nature of which the child might not understand. Hugh is a boy of more than ordinary intelligence, and he shewed great shrewdness in the witness box. He was, when the accident happened, capable of fully understanding the danger of going too near a horse straying upon a highway.

There is plenty of evidence to shew that this horse was interfered with on the day of the accident by boys, of whom Hugh was one; and Hugh says, that on the occasion when he was hurt, he went near to the horse to catch him by taking hold of a rope attached to the horse's head or neck. There was no reason why he should have gone near the horse. I must find as a fact that Hugh fully understood what he was doing, and the danger of interfering as he did with the horse at the time of the accident.

The case is, upon the facts, altogether outside of the cases in which contributory negligence cannot be imputed by reason of tender age.

Upon the evidence, and upon the answer which the jury has given to the question in reference to contributory negligence, the action should be dismissed with costs.

G. A. B.

[DIVISIONAL COURT.]

RUSSELL v. EDDY.

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1903

Feb. 27.

Costs—Third party—Rule 214—Discretion—Appeal.

Rule 214 gives power to the court or a Judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the defendant. Such an order is in the discretion of the court or Judge, and there is no appeal from it, unless by leave, as provided by the Judicature Act, R.S.O. 1897, ch. 51, sec. 72.

Tomlinson v. Northern R.W. Co. (1886), 11 P.R. 419, 526, is not applicable since Rule 214.

APPEAL by the plaintiff from the judgment of Meredith, J., at the trial, dismissing the action with costs to be paid by the plaintiff to the defendant and also to a third party brought in by the defendant.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J., on the 30th January, 1903.

W. H. Blake, K.C., for the plaintiff.

T. E. Godson, for the defendant.

The appeal as to the merits was dismissed at the argument.

February 27. The judgment of the Court on the question of costs was delivered by MEREDITH, C.J.:—The only matter undisposed of upon this appeal is the objection of the appellant to the provision of the judgment directed to be entered by the trial Judge for payment by the appellant of the costs of the third party.

Mr. Blake contended that the learned trial Judge had no power under the Rules to order a plaintiff whose action is dismissed to pay the costs of a third party, and in support of this contention cited *Tomlinson v. Northern R.W. Co.* (1886), 11 P.R. 419, 526, and *Williams v. South Eastern R. W. Co.* (1878), 26 W.R. 352.

Since these cases were decided, a new Rule on the subject has been adopted in this Province. It was passed on the 23rd

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June, 1894, and is now Rule 214,* and is the same as the English Rule, Order 16, Rule 54, which was passed probably in consequence of the decision in *Witham v. Vane*, 32 W.R. 617, (26th and 27th April, 1883), and came into force on the 24th October, 1883: Snow's Annual Practice, 1903, p. 203.

Rule 214 clearly, I think, gives power to the Court to order a plaintiff whose action is dismissed to pay the costs of the third party, as well as of the defendant, and if this be so, the matter is one of discretion, and there is no appeal, unless by leave of the Judge, and his leave has apparently not been asked, and has not been obtained.†

The case of *Tomlinson v. Northern R.W. Co.* is, therefore, now useful only as a guide to the Judge in the exercise of his discretion.

The result is, that the appeal must be dismissed with costs.

*214. The Court or Judge may decide all questions of costs, as between the third party and the other parties to the action, and may order any one or more to pay the costs of any other, or others, or give such directions as to costs as the justice of the case may require.

†By sec. 72 of the Judicature Act, R.S.O. 1897, ch. 51, "no order made by the High Court or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order."

T. T. R.

[DIVISIONAL COURT.]

NEELY V. PETER ET AL.

D. C.

1903

Feb. 6.

Water and Watercourses—Injury to Land by Flooding—Claim for Damages—Summary Procedure—Costs of Action—Erection and Maintenance of Dam—Liability of owners—Tolls—Liability of Lumbermen Using Dam—Injunction.

The judgment of Street, J., 4 O.L.R. 293, was affirmed for the reasons given by him; and, in addition to the damages awarded to the plaintiff against the added defendants, an injunction was granted restraining those defendants from penning back the waters of the river in question, but the operation of the injunction was suspended for a year to enable those defendants to acquire the right to overflow the plaintiff's land, under the provisions of R.S.O. 1897, ch. 194, or otherwise.

AN appeal by the plaintiff from the judgment of Street, J., 4 O.L.R. 293.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and FALCONBRIDGE, C.J.K.B., on the 19th January, 1903.

O. M. Arnold, for the plaintiff.

W. L. Haight, for the defendants.

February 6. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the plaintiff from the judgment pronounced by Street, J., after the trial of the action before him, sitting without a jury, at Parry Sound, on the 13th May, 1901.

We agree with the judgment and the reasons for it as reported in 4 O.L.R. 293, but it appears that the attention of the learned trial Judge was not called to the fact that the appellant claimed, in addition to damages, an injunction to restrain the respondents from penning back the waters of the north branch of the river Seguin, as he claimed that they had wrongfully done.

It followed, we think, from the conclusion to which the learned Judge came, that, in addition to the damages which were awarded to him, the appellant was entitled to the injunction which he claimed as against the respondents the Parry Sound River Improvement Company, but the operation of it should, we think, be suspended for a year in order to enable

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these respondents to acquire the right to overflow the appellant's land, under the provisions of R.S.O. 1897, ch. 194, or in any other manner in which they may acquire that right; and the judgment should be varied accordingly.

No change in the disposition made of the costs of the action should, we think, follow this variation of the judgment. The appellant, as his case stood at the close of the argument at the trial, entirely failed, and he has succeeded only as to the defendants who were then upon their consent added as defendants, and in these circumstances it is not reasonable that any part of his costs up to judgment should be borne by those added defendants.

As the appellant has failed in his attack upon the judgment, in as far as it directed the action to be dismissed as against the original defendants, and has succeeded on the other branch of his appeal, there will be no costs of the appeal to either party.

E. B. B.

[IN CHAMBERS.]

CRERAR ET AL. V. CANADIAN PACIFIC R.W. CO. ET AL.

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March 6.

Lien—Mechanics' Liens—Action—Practice—Affidavit Verifying Statement of Claim—Particulars of Residence of Plaintiffs.

In the case of an action under the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, ch. 153, the affidavit verifying the statement of claim, required by sec. 31 (2), may be made by the plaintiffs' solicitor as agent.

The plaintiffs were day labourers, who did work for the defendants on a railway in an unorganized district, and it was set forth in the statement of claim that they resided in that district; the name and address of the plaintiffs' solicitor were also stated therein:—

Held, that it was not necessary to give more precise particulars of the places of residence of the plaintiffs.

AN appeal by the plaintiffs from an order of the Judge of the district court of Rainy River, in an action to enforce mechanics' liens, directing an amendment of the statement of claim; and a cross-appeal by the defendants Vigeon Brothers from the same order in so far as it refused to set aside the statement of claim because not verified by an affidavit or affidavits made by the plaintiffs. The facts are stated in the judgment.

The appeal was heard by BOYD, C., in Chambers, on the 6th March, 1903.

J. H. Spence, for the plaintiffs.

H. L. Drayton, for the defendants Vigeon Brothers.

MARCH 6. BOYD, C.:—Having regard to the canons of construction laid down in *Bickerton v. Dakin* (1890-91), 20 O.R. 192, 695, and seeing that the object of the legislation has been to simplify the procedure, I think the learned Judge rightly ruled that the affidavits of verification by the solicitor, as agent, was a sufficient compliance with the statute. The statutory act which gives vitality to the lien is its due registration, and this may be effected by the affidavit of an agent or an assignee of the claimant. The bringing of the action is, as it were, ancillary to this, and in order to its enforcement. The

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original of R.S.O. 1897, ch. 153, sec. 31 (2),* provided merely that the statement of claim should be verified by affidavit though a form of affidavit was given in the schedule. The revised Act refers to this form in the body of the statute. But these forms are not of inflexible use, and if the verification is in the same way and to like effect as in the case of registration, I think there has been "substantial compliance," to use the phrase found in sec. 19 (1), with the scheme of the Act.

The learned Judge, however, has directed that the plaintiffs amend the statement of claim by indorsing thereon "the particulars of the plaintiffs' residence as required by the Rules in that behalf." The ten plaintiffs are day labourers who did work for the defendants on the railway in the district of Rainy River, and it is set forth in the statement of claim that they reside in that district. The plaintiffs' solicitor says in an affidavit that they move about from place to place as they obtain employment, and it is said that defendants were present during the carrying on of the work and have knowledge of who the plaintiffs are, and that the information given as to residence is as much as is practically possible. It is evident that these plaintiffs have no fixed place of abode, to which reference could be made in order to find them. What may be a salutary provision as to the ordinary litigant in town or country might work injustice in the case of newly opened territories, occupied by "wage-earners" who move with their job of work. It is not desirable nor is it needful that all the niceties of practice in due sequence should attach to the summary procedure provided for the realization of workmen's liens.

Now, what are the Rules applicable? In the case of a writ of summons, where the plaintiff sues by solicitor, the writ is to be indorsed with the solicitor's name and place of business: Rule 134. True it is, that by the practice in the High Court and by the incorporation of the form of writ, which is not a part of the Rule, the address of plaintiff himself is also to be given (*i.e.*, his place of residence). But the Rules themselves

* Without issuing a writ of summons, an action under this Act shall be commenced by filing in the proper office a statement of claim, verified by affidavit (Form 5.)

only require *that* to be given when the plaintiff sues in person : Rule 135. The Rule which applies to this case is Rule 136 : "Indorsements similar to these mentioned in the two next preceding Rules shall also be made upon every writ issued and upon every document by which proceedings are commenced in cases where proceedings are commenced otherwise than by writ of summons." This statement of claim under the Act R.S.O 1897, ch. 153, sec. 31, contains the name and address of the solicitor by whom it is issued and filed, and that meets the legitimate requirements of Rule 136. It was suggested that the address of the plaintiffs should be set forth in order to facilitate the obtaining security for costs in a proper case (see Rule 1199), and that is probably the reason why the practice in the High Court has settled into this form, even when a solicitor acts for the litigant. But, according to the scheme of the Rules, it is from the solicitor whose name is indorsed on the process that the information is to be derived as to the occupation, place of abode, and even street and house number, of the plaintiff, in cases where the defendant is at a loss to know his opponent, or suspects his absence from the country : Rule 143.

The Act allows these wage-earners to group themselves as litigants (sec. 32), and it would involve much waste of time and needless expense to have them all personally attend to make affidavits as to the claim, or to have their particular whereabouts in the district discovered to enable the solicitor to describe their precise locality at the time of amendment. They have a shifting residence, and, as it appears that all are within the limits of the district, I do not think the action should be stayed till more precise local information is given.

I allow the appeal with costs in the cause to the plaintiffs.

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[IN CHAMBERS.]

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RE BROWN AND SLATER.

Feb. 3.

Will—Construction—Life Estate—Estate Tail—Survivorship—Disentailing Deed—Condition of Devise—Bearing Testator's name—Vendor and Purchaser.

A testator devised the lands "whereon I now reside" to his son "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever, and in default of a second male heir to their eldest surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life." The testator's son had by the wife mentioned in the will four children, one son and three daughters, of whom one son and one daughter survived the testator's son and his wife. One of the daughters who predeceased the testator's son had previously joined with him in a disentailing deed in which it was recited that she was the tenant in tail in remainder expectant upon the decease of her father:—*Held*, that the testator's son took a life estate only, and the surviving daughter an estate tail male; and that the disentailing deed did not stand in the way of that daughter making a conveyance of the lands in fee.
Held, also, that the condition as to continuing to bear the testator's name did not prevent the daughter from conveying in fee.

MOTION by Mary Brown, the vendor, under the Vendors and Purchasers Act, for an order declaring that she is the owner in fee simple of the north halves of lots 4 and 5 in the 3rd concession of the township of East Flamborough, and as such entitled and able to make a valid conveyance thereof in fee simple to the purchaser, John Slater; that the disentailing deed and marriage settlement made between Alexander Brown and others and John Sproat on the 8th October, 1870, and registered on the 26th November, 1870, forms no cloud upon Mary Brown's title to the lands; and for such other order as may seem just.

By the will of Alexander Brown, made on the 29th December, 1842, whereof letters probate issued on the 9th October, 1852, "the lands whereon I now reside" were devised to the testator's son, also named Alexander Brown, "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever; and in default of a second male heir to their eldest surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life."

The vendor on the 21st January, 1903, made a statutory declaration that she was the eldest and only surviving daughter of Alexander Brown the younger, who died on the 31st July, 1880; that, under the devise in the will of Alexander Brown the elder, she became the owner of the lands in question; that her sisters, Martha Marion Brown, and Eliza Brown, afterwards Sproat, both predeceased their father; that immediately upon his death she (the declarant) entered into possession of the lands in question, and had been in undisputed possession ever since, and was unmarried.

It also appeared that Alexander Brown the younger had one son, who survived him.

The disentailing deed and marriage settlement above referred to were made at the time of the marriage of Eliza Brown, she being then, as recited, "tenant in tail in remainder immediately expectant upon the decease of the said Alexander Brown, her father."

A subsequent disentailing deed was made on the 31st January, 1877, by Alexander Brown and Mary Brown, the vendor, to a trustee for the benefit of Mary Brown.

The motion was heard by MEREDITH, J., in Chambers, on the 23rd January, 1903.

A. W. Brown, for the vendor.

W. T. Evans, for the purchaser.

February 3. MEREDITH, J.:—The first objection to the vendor's title is, that the devisee Alexander Brown took, under the will, an estate tail, and by deed effectually barred the entail.

If that were so, then the vendor would seem to have title by length of possession.

But, in my opinion, that devisee took a life estate only, and the estate tail male is devised to the vendor, she being the only daughter of that devisee, and "his present wife," who survived them. The survivorship is clearly of that devisee and his said wife, not of the testator.

Whether the word "now" refers to the date of the will, or, as more likely, to the time of the testator's death, the recitals

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in the deeds, the declaration furnished, and the possession of the land since the testator's death, shew that the land in question is that comprised in the devise in question.

It is to be observed that neither that devisee nor any one else seems ever, until after the contract in question was made, to have claimed or supposed that he took more than a life estate, or that the land in question is not that which the testator described as that whereon he "now" resides. The deed in question was executed by that devisee as life tenant, and he is therein recited to be, and is throughout described as, such.

The deed in question was made and registered in the year 1870; there seems to have never been any possession, or claim of any character made, under it; and, being on the face of the registered title deeds ineffectual, it does not stand in the way of the completion of the purchase. It would be different if any claim were being made under it so that the case would be one of selling and buying a lawsuit, as well as the land, if the contract were carried out.

Then as to the objection upon the ground that the devise to the vendor is subject to the provision that she continues to bear the testator's name during her life. There has been no breach of it yet; and it is said that such a condition cannot be attached to an estate in fee simple, and that a tenant in tail by barring the entail and enlarging his estate into a fee simple defeats a condition for taking and using the testator's name: see Jarman on Wills, 5th ed., pp. 899, 900, and *In re Cornwallis* (1886), 32 Ch. D. 388: and from one point of view at all events there appears to be in it a restriction of the power of alienation quite antagonistic to the quality of an estate in fee simple. The devisee cannot sell, mortgage, lease, or otherwise dispose of the land effectually because up to the last moment of her life her name may be changed. I give effect to the view of the law cited. The devisee is hardly likely at this late day to disregard or to have any occasion for disregarding the testator's wishes in this respect: see *Bird v. Johnson* (1854), 18 Jur. 976.

Mr. Evans's last point taken upon the argument was, that the vendor had conveyed the lands to a trustee and so had not

the legal estate. No objection of this character seems to have been previously taken; the grantee seems to be but a bare trustee for the vendor; and I do not understand that there is any objection on her part to procure a conveyance from him to the purchaser; the matter seems one of conveyancing merely and in regard to which there is no contention between the parties.

Notwithstanding anything that has been urged against it, the vendor has, in my opinion, shewn a good title to the land in question. By agreement between the parties there is to be no order as to costs.

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[IN CHAMBERS.]

RE LLOYD AND PEGG.

1903

Feb. 3.

Arbitration and Award—Order for Leave to Enforce Award—Time—Arbitration Act, sec. 45—Motion to Set aside Award.

An application under sec. 13 of the Arbitration Act, R.S.O. 1897, ch. 62, for an order giving leave to enforce an award, need not be made within six weeks after the publication of the award.

Section 45 of the Act does not apply to such an application, but only to applications to set aside awards.

An order under sec. 13 is necessary when the reference has been made out of Court.

Objections properly the subject of a motion to set aside the award were not given effect to upon appeal from an order under sec. 13.

APPEAL by Pegg from an order of the Master in Chambers giving Lloyd leave to enforce an award. The facts are stated in the judgment.

The appeal was heard by MEREDITH, J., in Chambers, on the 23rd January, 1903.

A. B. Armstrong, for the appellant.

R. L. Johnston, for Lloyd.

February 3. MEREDITH, J.:—This appeal is against an order of the Master in Chambers, made under sec. 13 of the

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Arbitration Act, giving leave to enforce an award in the same manner as a judgment or order of the Court to the same effect may be enforced.

The grounds of the appeal are: (1) that the application should have been, but was not, made within six weeks after the publication of the award, there having been no extension of the time under special circumstances; (2) that no order was necessary; and (3) that the award was manifestly unjust in these respects, (a) because evidence was taken in the absence of the appellant by the arbitrator, and (b) because the award erroneously allowed the respondent \$200 in respect of the Winar transaction and \$550 in respect of the Sheppard transaction.

The contention is, that sec. 45 of the Act* covers an application of this character—for leave to enforce an award—but that is not so. The section applies to all applications to set aside an award, but not including an appeal against an award, which secs. 14 and 34 provide shall not be made after the expiration of 14 days from the filing of it, except by leave under special circumstances. The omission of a comma at the end of the first line of the section in its last two re-enactments cannot be permitted to destroy or very largely alter its meaning. All applications—all what applications? The appellants say all applications under the Act; but why read in the last three words? It cannot mean all applications under the Act, for some provided for in it are to be made before award, even before the reference. The next preceding section deals with “any appeal or motion to set aside an award.” Plainly “all applications” means all applications of that character. It is not very accurate to say “an appeal to set aside an award;” but in dealing with motions to set aside awards care is taken, perhaps needless care, to exclude from all applications to set aside an award, an appeal against an award under secs. 14 and 34. To be strictly right from a grammatical point of view the section is to be read as it originally was, or better still thus:—

*All applications, otherwise than by way of appeal to set aside an award made on a submission shall be made within six weeks after the publication of the award, but the Court or Judge may under special circumstances allow the application to be made after the said time. R.S.O. 1897, ch. 62, sec. 45 (1).

All applications to set aside an award (but not including an appeal against an award) made on a submission, shall be made, etc.

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The second contention ends when it is said that the reference was one made out of Court—not in any cause or matter in any Court.

And as to the other grounds: it is not even asserted that the appellant had not due notice of the appointments upon which it is said evidence was taken in his absence, such notice as would justify the arbitrator in proceeding *ex parte*, and the items in regard to which error is alleged were apparently fully gone into in the evidence taken, and in the arguments of counsel for all parties had, before the arbitrator. These matters were properly the subject of a motion against the award, if really considered of any consequence; but no motion has been made against it, and these alleged injustices are put forward only when proceedings to enforce the award became troublesome. They ought not to delay the order now, but a refusal to give any effect to them upon this motion is not to, and will not, prejudice any other proper use the appellant may be able to make of them.

Appeal dismissed with costs.

T. T. R.

[IN THE COURT OF APPEAL.]

C. A.

1902

Oct. 1.

1903

Jan. 26.

RE PUBLISHERS' SYNDICATE.

PATON'S CASE.

*Company—Winding up—Transfer of Stock—Power of Attorney—Scope of—
Payment to Directors—Validity of.*

The directors of a company under the belief, which was erroneous, that there was no unallotted stock, procured through an agent, powers of attorney from several persons, which were pasted by the secretary in the transfer book. These powers authorized the agent "to receive from the vendors a transfer" of a specified number of "shares in the company, purchased by me from him," and "to sign, in the books of the company my name to the acceptance and transfer" thereof. One of the appointors, whose power called for three shares, subsequently signed an application therefor, and, on his payment for the stock, received a stock certificate. Another appointor, whose power of attorney called for five shares, forthwith paid the company for two and received a stock certificate therefor, and, on his subsequently paying for the remainder, received stock certificates therefor. The other appointors also paid for the amount of shares specified in their powers and received stock certificates, no transfer then being made of the stock by any vendor nor any acceptance thereof, what took place amounting to an allotment of stock by the company. Several months afterwards, P., an original shareholder, and provisional director and subsequently a director and superintendent of the company, becoming aware of the existence of these powers of attorney, and of no transfers having been made thereunder, filled in opposite the names of the various appointors transfers of stock from him to them, to the numbers specified in their powers, procuring the agent, as their attorney, to accept the transfers, for which the agent was paid by the company at P.'s instance \$60 for alleged commission. On the winding up of the company:—

Held, by the Court of Appeal that neither the transfers of stock made by P. nor the \$60 payment could be supported, and that P. must be placed upon the list of contributaries.

The judgment of Meredith, C.J., limiting the liability of P. to certain of the shares referred to, and as to his non-liability for the \$60, reversed.

Shortly after the incorporation of the company, a meeting of the provisional directors, who were then the only shareholders, was held, when a resolution was passed under which P. was paid \$300 out of capital, for alleged services, it not appearing that any service had then been rendered by him. The minutes of this meeting were confirmed at a subsequent shareholders' meeting. At the time no profit had been made by the company and, so far as the books shewed, nothing had been paid on account of the stock.

No by-law was passed authorizing these payments:—

Held, that the payment of \$300 could not be supported.

Judgment of Meredith, C.J., reversed.

THIS was an appeal and a cross-appeal from the judgment of Meredith, C.J.C.P.

Under letters patent issued on the 6th May, 1897, Robert B. Willing, William S. Milne, John H. Paton, James L. Ross and M. M. Fenwick were appointed the provisional directors of

a company, incorporated under the name of "The Publishers' Syndicate of Ontario, Limited."

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The corporation were to constitute a syndicate for the purpose of handling the publications of British, American and Canadian publishers, for publishing, importing, buying and selling and trading in books, etc., and in carrying on the business of printing, bookbinding, etc.

The form of the stock subscribed was as follows:—

"The Publishers' Syndicate of Ontario, Limited.

Memorandum of Agreement and Stock Book.

We, the undersigned, do hereby severally covenant and agree, each with the other, to become incorporated as a company under the provisions of the Ontario Companies' Act, under the name of the Publishers' Syndicate of Ontario (Limited), or such other name as the Lieutenant-Governor-in-Council may give to the company, with a capital of forty-five thousand dollars, divided into four hundred and fifty shares of one hundred dollars each.

And we do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts."

John H. Paton had subscribed for twenty shares of stock in the company.

Immediately after the issue of letters patent, notice was sent to the above provisional directors, who were then the only shareholders of the company, notifying them of a meeting of the shareholders to be held on the 22nd May, 1897, for the election of directors, the making of by-laws, and transacting any other business which might lawfully be done at such meeting.

The meeting was duly held, and while the above named persons were present, resolutions were moved and carried appointing each of the said provisional directors officers of the corporation, namely — M. M. Fenwick, president; Robert B. Willing, managing director; William S. Milne, secretary-treasurer; John H. Paton, superintendent; and Messrs. Rowan

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& Ross, solicitors; the above named James L. Ross being the Ross referred to.

A resolution was also moved and carried that Mr. Fenwick as president, and Mr. Willing as managing director, be each paid a salary of \$100 a month, to commence on the 1st May, 1897; and as a further remuneration each of these should be allowed \$1,000 in paid-up stock; that Mr. Paton be paid a salary of \$50 a month, to commence on the 1st June, 1897; and as a further remuneration he should also be allowed \$1,000 in paid-up stock; and that as soon as he could give his whole services to the business his salary should be the same as the president's and the managing director's.

At this meeting a resolution was also carried that the sum of \$300 be paid to each of the provisional directors for services rendered.

This meeting was adjourned until the 24th May, to enable Dr. Ferguson, who desired to become a shareholder, to be elected a director; and at the adjourned meeting on the 24th May, on its being reported that Dr. Ferguson had become a shareholder, he was elected a director and made vice-president of the company.

On the 8th January, 1898, at a meeting of the board of directors, as appeared from the minutes, the board were informed that Mr. Milne had been acting as accountant under special agreement as to salary; whereupon it was resolved that he be employed in that capacity for a term to end on the 31st December in 1898, and that he be paid therefor \$1,000 in paid-up stock.

On the 9th January the account of Messrs. Rowan & Ross was submitted to the board of directors, amounting to \$405, which was passed. A resolution was also passed acknowledging same, and in consideration of their undertaking to do all the solicitors' work for the company until the 31st December, 1898, they were to be paid \$1,000 in fully paid-up shares of the company.

On July 28th, 1898, immediately preceding the first annual general meeting held on that day, a meeting of the directors was held at which Messrs. Fenwick, Ross, Milne and Ferguson were present, when a resolution was passed directing that Dr. Ferguson should be paid \$375 for services rendered.

At the meeting of shareholders then held the old board were re-elected directors; and at the first meeting of the new board on the same day, it was decided that the question of salaries for the year be postponed to a future meeting; and on the 17th October, 1898, it was resolved that the salaries of Messrs. Fenwick, Willing and Paton be at the rate of \$100 a month until the end of 1898, being the same as those paid in the latter part of 1897, less the \$1,000 of fully paid-up stock.

At a meeting of the directors held on the 25th April, 1899, these salaries were continued till the end of May, 1899; and at a meeting of the board on the 10th May, 1899, they were continued until the regular meeting in June.

At a meeting of the board held on the 2nd August, 1899, a resolution was passed retaining Mr. Willing on a monthly engagement of \$100 a month; and at a meeting of the board on the 6th September, 1899, the salaries of Mr. Fenwick and Mr. Paton were fixed at \$125 a month from the 1st July, 1899. Mr. Willing ceased to be a director in July, 1899, and shortly afterwards left the services of the company.

The salaries of Messrs. Fenwick and Paton continued at the above rate until the end of June, 1901, when in consequence of the state of the finances the salaries were stopped on that date.

In July, 1900, a bonus of \$500 was given to Mr. Fenwick and Mr. Paton.

In August, 1900, under the belief that there was no unallotted stock which the company could issue to applicants for shares, the company, instead of applications to the company for stock being made directly, authorized a number of agents to obtain powers of attorney from persons desirous of becoming shareholders. These agents procured powers of attorney to be signed by the following persons, amongst others, Dr. Moorhouse, of the city of London, for three shares; Malcolm Brodie, of the village of Forest, five shares; W. H. Hopper, J. J. Farley, and M. J. Clarke, for one share each; M. Hermine Connolly for four shares, and James Mitchell for two shares, which were handed into the company and pasted by the secretary in the transfer book.

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The power of attorney appointed the attorney the appointor's agent, "for me," *i.e.*, the appointor, "and in my name, and on my behalf, to receive from the vendor a transfer of shares of the capital stock of the Publishers' Syndicate, Limited, purchased by me from him, at the sum of \$, and to sign on the books of the company my name to the acceptance of the transfer of the said shares; and to do all other acts, and to sign all such other papers as are necessary to vest in me the title to the said shares."

Mr. Paton paid for three of the shares, applying the \$300 paid him by the company. As to the other unpaid shares held by him, he in 1901, seeing the powers of attorney, and that no transfers had been made thereunder, filled in opposite the names of the various appointors transfers of his stock from him to them, transferring three of his shares to Dr. Moorhouse and five of his shares to Mr. Brodie, one to W. H. Hopper, J. J. Farley, and M. J. Clarke respectively; four to M. Hermine Connolly, and two to James Mitchell, and he procured the agent as their attorney, to accept the transfers, and he caused the agent to be paid by the company \$60 for alleged commission.

Dr. Moorhouse had on the 19th October, 1900, signed an application for three shares, which was accepted and entered in the register of shareholders, and he was given credit for three shares of the stock of the company in the stock ledger.

On the 24th January, 1901, the company drew on Dr. Moorhouse a three days' sight draft for \$300 in payment of these shares, which Dr. Moorhouse accepted and paid, and a certificate for the three shares, dated 30th January, 1901, was issued and sent to him signed by Dr. Ferguson as vice-president, and Mr. Paton as acting secretary, and a certificate was then issued to him for these three shares; and his name was entered on the stock ledger.

As to Mr. Brodie, on the receipt of his power of attorney, the company drew on him for \$200, the value of two shares, and on his acceptance and payment of the draft, the company sent him a certificate for two shares. The secretary was of the opinion that Brodie had made an application for two shares, but he was apparently mistaken as to this. Sub-

sequently he paid to the company the value of the three remaining shares by three instalments of \$100 each; and his name was entered in the stock ledger for the five shares.

As to the said other parties, shortly after the receipt of the powers of attorney, they paid for the respective number of shares, and certificates were issued to them; and they were entered in the stock ledger.

The additional evidence, so far as material, is set out in the judgments.

On September 16th, 1901, an order was made by Ferguson, J., declaring the company insolvent, and directing it to be wound up; and by another order of the same date a liquidator was appointed, and the matter was referred to Mr. Winchester as official referee, to whom all the powers conferred upon the Court under the Winding-up Act and amendments were delegated.

Upon an application made by the liquidator to place the name of John H. Paton on the list of contributories, the official referee directed that he should be placed on the list of contributories as to the sum of \$300; but as to the \$1,000, while holding a very strong opinion that this was given without any consideration, he felt he was bound by the decision *In re Ontario Express and Transportation Company* (1894), 25 O.R. 587, 589, and could not therefore hold him liable for that sum.

He further directed that the said John H. Paton should be placed on the list of contributories in respect of the three shares transferred to Dr. Moorhouse, and the five shares transferred to Malcolm Brodie. He refused to place him on the list of contributories for nine other shares, transferred by him to W. H. Hopper, J. J. Farley, M. J. Clarke, M. Hermine Connolly, and James Mitchell; but he held he should pay the amount of the commissions paid to the agents.

From this judgment John H. Paton appealed to a Judge sitting in Weekly Court.

There was a cross-appeal by the liquidator against the allowance by the official referee of the \$1,000, and also to place the said John H. Paton on the list of contributories for the said nine shares.

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On October 1st, 1902, the appeal was argued before
MEREDITH, C.J.C.P.

A. T. Kirkpatrick, for the appellants.

C. D. Scott, for the respondents.

October 1. MEREDITH, C.J.:—With regard to the \$60 which the referee has assumed, upon the motion to settle the list of contributories, to charge the appellant with, it seems to me that upon that application there was no jurisdiction to do anything of the kind. It may be that the appellant is indebted to the company in respect of the \$60, and that he can be reached in the ordinary way for that, or it may be that he is amenable to the jurisdiction under the Winding-up Act to proceed against directors: section 83; but the case has not been dealt with under that section. The appeal as to the \$60 must, therefore, be allowed, without prejudice to any right of the company or the liquidator against the appellant in any other forum or by any other means, if there is any such right.

With regard to the five shares said to have been transferred to Dr. Moorhouse and Brodie respectively — three to Dr. Moorhouse and two to Brodie — I am of opinion that the appeal fails and must be dismissed. It appears from the evidence that the company had upon its books a number of shareholders, who were not men of ability to answer their engagements, holding stock that had not been paid for, and that the company was desirous of getting in other shareholders; and it appears to have been thought that there were no unallotted shares which the company could issue to applicants for shares. That appears to have been a mistake. There were shares sufficient to answer these two applications, at all events, unallotted, which might have been allotted to the applicants.

Matters being in this position, the company determined to send out its agents for the purpose of getting persons to become shareholders in the company, and the form devised for the purpose of carrying out the arrangement to which I have referred, was to put in the hands of these agents blank powers of attorney, which were to be signed by persons desiring to

become shareholders, giving authority to some one whose name is blank, or to J. W. Stark, one of the agents who was commissioned by the company to enter upon this work, to receive from the vendor a transfer of shares of the capital stock of the Publishers' Syndicate, and to accept them upon the books of the company.

Dr. Moorhouse was waited upon by Mr. Stark, and signed one of these powers of attorney authorizing Stark to receive from the vendor three shares of the capital stock of the Publishers' Syndicate, and to accept them upon the books of the company. That power of attorney is dated the 27th August, 1900.

Dr. Moorhouse was subsequently waited upon by another agent of the company, and on the 29th October signed an application for three shares in the company. That application was submitted to the board, the shares were allotted to Dr. Moorhouse, and he paid for them, and a certificate was issued to him in respect of them.

It is manifest that Dr. Moorhouse never intended to become a shareholder for more than three shares in the company, and that the company understood this. An examination of the stock ledger makes it clear that the company understood that three shares only were to be given to Dr. Moorhouse either by allotment or under this power of attorney or otherwise.

The appellant was a director of the company, and, after the three shares had been allotted to Dr. Moorhouse and paid for, and the certificate had been issued, as I have said, upon his attention being called to the fact that a number of applications had been pasted in the book opposite to which no transfers were made of shares, filled out opposite Dr. Moorhouse's name a transfer from himself to Dr. Moorhouse of three shares, and procured Stark to accept the shares on behalf of Moorhouse.

The document of transfer and acceptance is dated the 8th February, 1901, which is probably an earlier date than that on which it was actually signed.

The proper conclusion from the evidence is, I think, that contemporaneously with the doing of this, Paton directed the clerk or manager, or the bookkeeper of the company, to alter

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the entry in Dr. Moorhouse's account, and, contrary to the truth, to make it appear that the three shares for which Dr. Moorhouse had paid were not shares that had been allotted to him by the directors, and to substitute for those three shares the three shares which he purported upon this day to transfer to Dr. Moorhouse.

Now it is manifest, I think, that it was perfectly understood that these powers of attorney were to be used only for the purpose of enabling the company, as far as it was unable to do so by unallotted shares, to answer the contracts which it had entered into with applicants for shares. If that be so, it follows that this power of attorney could not rightly have been used for the purpose of loading Dr. Moorhouse with three shares besides those which had already been allotted to him by the company and for which he had paid.

There is the further difficulty that the power of attorney is to accept from the vendor three shares. There never was any purchase by anybody on Dr. Moorhouse's account of three shares. There is no pretence that Stark ever bought any shares from Paton on behalf of Dr. Moorhouse, and, although it is not necessary to determine that, my view of the power of attorney is that it was only when Dr. Moorhouse had purchased shares from a vendor that the power to Stark to accept the transfer of them operated.

The power of attorney is not to purchase shares on his behalf, but to receive from the vendor a transfer of three shares. It seems to me, therefore, to make it effective that there must follow this power of attorney a transaction by means of which Dr. Moorhouse becomes the purchaser of the shares, and there was no such transaction.

The power of attorney, it is true, is headed, "A power of attorney to buy," but there is nowhere authority given to Stark to buy shares, and there never was, as I have said, any purchase from Paton.

It appears to me a most unjust and unreasonable thing that Paton, one of the directors of the company, should under these circumstances attempt to use this form adopted by the company to unload upon Dr. Moorhouse three shares which he never intended to purchase, and by so doing relieve himself

from his obligation to pay for these shares for which he had himself subscribed.

The long delay after the date of the power of attorney—27th August—1900, is also a circumstance very much against the contention urged by Mr. Kirkpatrick. I do not think that it was at all necessary that there should be any formal revocation of the power of attorney. Dealing with an outsider, perhaps a longer delay than occurred in this case might have been necessary to put him upon inquiry; but here months had elapsed before any attempt was made to use the power of attorney, and I think that put Mr. Paton on inquiry as to how it came that the power of attorney had not been previously acted upon.

With regard to the Brodie shares, it appears that Brodie on the 1st September signed a power of attorney similar in form to that signed by Dr. Moorhouse. He made his application for five shares. The company, notwithstanding its ability to pay the comparatively large sums which had been paid to its directors, seems to have been rather impecunious, and made applications to Brodie to pay \$200, the par value of two shares. Brodie paid that, and there was entered in the stock journal an allotment of the two shares in the company for which he had paid. There then remained three shares, for which he had still to pay. These were paid for in three instalments of \$100 each.

It is plain from the book that there never was any idea—as, indeed, is part of Mr. Kirkpatrick's argument—on the part of Brodie that he should ever have any more than the five shares; but the argument is that the allotment of the two shares of what is called "treasury stock" should be treated as erroneous, and that Brodie should be treated as having taken the five shares which Paton assumed to transfer to him by the transfer of the 8th February, 1901. I think that is not so. The company had the two shares, and they allotted them to Brodie, and he paid for them, and there remained only three more to be acquired by him.

The same observations which I have made with regard to the Moorhouse case apply to this case, and Paton had no right to use this power of attorney for any other purpose than to enable the company to complete the contract which it made, or

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to complete the transaction by giving to the shareholder the number of shares for which he was applying. He had got two, and there remained only three, and therefore the power of attorney must be limited to the three.

I was very much pressed by Mr. Kirkpatrick to have regard to the documents. It would be, I think, a very extraordinary thing to have regard to the documents in the face of the clear evidence as to the purpose of all these documents and the intentions of the parties. That would be looking to the form instead of, to the substance of the transaction. According to the substance of the transaction, I think that this director Paton was at the time of the winding-up order the owner of at least five shares, and has been properly placed upon the list of contributories in respect of them.

There remains the question as to whether the referee has properly determined that the sum of \$300, which has been credited to the appellant in respect of three other shares, paying them up in full, was improperly so credited, and that he was liable as a contributory in respect of these shares.

As I understand the facts, the company was composed of five persons; that the original shareholders were the five provisional directors, being also the shareholders of the company, and in form constituted themselves directors and shareholders, and assumed to resolve that each of the directors should be paid \$300 for services which, before that date, had been performed by them for the company.

The minutes of that meeting appear to have been read at the next annual meeting of the company, when there were real shareholders of the company, a body of shareholders, and to have been approved. I should have had very great difficulty in coming to the conclusion that it was within the power of the provisional directors, who were also the nominal shareholders or stockholders of the company before the charter of the company had been accepted, and at the meeting when it was accepted and when they had met for organization, to have assumed to deal with the moneys of the company in the way in which these gentlemen seem to have thought it was in their power to do.

However, the subsequent meeting was a ratification apparently by the body of the shareholders of what had been done, and the appellant is entitled to succeed, unless the referee was right in coming to the conclusion that the fact was that these payments could be made only out of the capital, and that was fatal to the right of the directors to receive payment. In the case of *Re Lundy Granite Co., Ltd., Lewis's Case* (1872), 26 L. T. N. S. 673, cited by Mr. Kirkpatrick, it appears to have been determined that there is nothing to prevent the payment out of the capital to the directors for services rendered; and the observations in the case of *Re Newman*, [1895] 1 Ch. 674, from the judgment of Lord Justice Lindley, appear to be applicable not to the case of a payment for services, but to a present made by shareholders to a director; and what Lord Justice Lindley seems to say there is that there is no power to withdraw from the capital of the company moneys for the purpose of making a present to the directors. That is not opposed to the decision in the *Lewis* case, that directors may be paid *for their services* out of the capital of the company. My present impression is that the learned referee was wrong in holding that the \$300 were not properly credited to the appellant, and unless that impression is removed by further consideration, the appeal will be dismissed as to the three shares alleged to have been transferred to Dr. Moorhouse, and the two shares alleged to have been transferred to Brodie, and will be allowed as to the \$60 and as to the \$300, and there will be no costs to either party.

I allow the appeal as to the three shares which are entered in the books as paid up, and dismiss the appeal as to the other five shares. I allow the appeal, also, as to the \$60 charged to the defendants, without prejudice, as I have already intimated, to the company or the liquidator seeking to recover that in any other way.

Then, as to the cross-appeal. I affirm the judgment of the Master in his refusal to put the said John H. Paton on the list of contributories for the said nine shares.

As to the \$1,000, I think I am bound by the decision in the *Ontario Express* case, which the referee properly followed, to hold that any payment made to a director for services as such,

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is not to be treated as a mere voluntary payment and within the provisions of the statute, which has already been referred to. It is impossible, in this case, to say that this was a present to the respondent. It may be that he was very well paid for his services; but I do not understand that if a company says to a man, to induce him to enter into its services, we will give you \$1,000 of stock and \$50 a month as long as we can get on, and he agrees to that, that is not a bargain with consideration on both sides, or why the whole bargain must not stand.

I think this appeal must, therefore, be dismissed. If there is a consent to allow the costs to be set-off against the claim, I will dismiss it with costs, but if not, without costs.

From this judgment there was an appeal and cross-appeal to the Court of Appeal.

On December 1st, 1902, the appeal was argued before MOSS, C.J.O., MACLENNAN, GARROW and MACLAREN, J.J.A.

E. B. Ryckman, and *A. T. Kirkpatrick*, for the appellant.
C. D. Scott, for the respondent.

January 26. The judgment of the Court was delivered by MACLAREN, J.A.:—Mr. Paton has appealed from the judgment of the learned Chief Justice of the Common Pleas affirming that part of the report of the official referee which held him liable as a contributory for five unpaid shares in the company, viz., three which he had transferred to Dr. Moorhouse and two to Malcolm Brodie.

In my opinion the evidence shews clearly that the real transactions between the company on the one hand, and Moorhouse and Brodie on the other, were that the two latter should become shareholders in the company, and that the powers of attorney given by them were taken instead of ordinary applications for stock, at the instance of the company, under the mistaken belief that there was at that time no treasury stock to meet such applications, and that it would be necessary to receive transfers of shares which had been allotted to prior applicants who were unable to pay for them. Moorhouse and Brodie having paid the company for the five shares in question, and having received their stock certificates for them some time previous to the transfers from Paton, the latter

could not relieve himself from liability by attempting to transfer his unpaid shares to these parties, when he did not and could not make them liable to the company for their payment. It may be noted that the motion for the allotment of the three company shares to Dr. Moorhouse was made at the meeting of the board by Paton himself.

It was strongly argued before us on behalf of Paton that he could transfer his unpaid shares, even although his object might be to escape liability, and that we should accept as conclusive the entries in the books.

I do not consider the authorities cited to us on this point to be applicable to the present case. It was known to the company, and to Paton, that these applicants did not apply for or desire more shares than mentioned in the powers of attorney. After they had paid the company for and accepted certificates of paid-up shares in fulfilment of their contracts, Paton could not effectually transfer to them his unpaid shares without their knowledge or consent, and I do not think that the old powers of attorney could properly be used to accept transfers of these shares under the circumstances.

In my opinion, the judgment appealed from is in this respect correct, and the appeal of Paton should be dismissed.

The liquidator has brought a cross-appeal from that part of the judgment of the learned Chief Justice which allowed Paton a credit of \$300, and which reversed the report of the official referee on this point.

This sum was voted to Paton and a like amount to each of the other provisional directors for alleged services as such directors. It was done at what was called a joint meeting of shareholders and provisional directors held for organization, sixteen days after the date of the letters patent, the provisional directors being the only shareholders at the time.

These directors were not servants of the company, but managers, and, apart from contract or agreement, could not claim remuneration for their services, so that such a payment would be in the nature of a gratuity, and should be authorized by by-law.

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Section 46 of the Ontario Companies' Act, 1897, under which the company was incorporated, provided that no such by-law should be valid or be acted upon until it had been confirmed at a general meeting of the shareholders. I am of opinion that the resolution in question was not a sufficient compliance with this section, even although it formed part of the minutes which were read at the annual meeting held the following year, and which were confirmed in the ordinary way.

It is further to be observed that no profits had been made at this time, and, according to the books, nothing had been paid in by any person on account of his stock.

I think this case is clearly distinguishable from *Re Lundy Granite Co., Ltd.*, *Lewis's Case*, 26 L.T.N.S., 673, to which we have been referred. There the payment in question was expressly authorized by the articles of association of the company. Here there is no such provision in the Act or the letters patent, and nothing to take it out of the general rule laid down by Lord Lindley in *Re George Newman & Co.*, [1895] 1 Ch. 674, at p. 686, that the remuneration of directors for their trouble as such, even when authorized by the shareholders, can only be made out of assets properly divisible among the shareholders themselves, and not out of capital.

The liquidator has also appealed to this Court against the decisions of the referee and the Chief Justice in refusing to place Mr. Paton on the list of contributories with respect to nine other unpaid shares which he transferred to certain other parties at the same time as he made the transfers to Moorhouse and Brodie, viz., one share to W. H. Hopper, one to J. J. Farley, one to M. J. Clarke, four to M. Hermine Connolly, and two to James Mitchell. I am unable to find anything in the circumstances relating to these nine shares to place them on a different footing from the five shares transferred to Moorhouse and Brodie, and the same rule should be held to apply.

The cross-appeal with respect to the \$300 and to these nine shares should therefore be maintained, and Mr. Paton placed on the list of contributories for \$1,700. The liquidator to have the costs of this appeal and cross-appeal, and the costs below in respect of the cross-appeal.

G. F. H.

[MEREDITH, C.J.C.P.]

THE LONDON LIFE INSURANCE COMPANY

v.

THE MOLSONS BANK.

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Jan. 16.

Banks and Banking—Cheques—Life Insurance—Fraud of Agent—Payment by Bank—Right of Company to Recover Amounts Paid.

N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five the insurances subsequently lapsed, of which the company were kept in ignorance. Afterwards N., representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, when cheques for the respective amounts, made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt, to see the payees and procure discharges from them. N. was in the habit of certifying to the bank the genuineness of the signatures of the payees of the cheques in payment of claims, and most of the cheques in question had been certified to by him. The endorsements of the payees' names were forged by N., and the cheques presented to the bank and paid in good faith, to whom or how did not appear, the amounts thereof being charged to the company's account:—

Held, that the company was affected by what had been done by N., so as to preclude it from disputing the right of the bank to pay the cheques and charge the plaintiffs with the amounts.

THIS was an action tried before MEREDITH, C.J.C.P., without a jury, at Ottawa, on the 19th June, 1902.

Aylesworth, K.C., Edgar Jeffery with him, for the plaintiffs.

Hellmuth, K.C., C. H. Ivey with him, for the defendants.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment, in which the facts, so far as material, are set out:—

January 16. MEREDITH, C.J.:—The plaintiffs sue to recover from the defendants, who were their bankers, moneys which were paid, as the plaintiffs allege, without their authority, and improperly charged to their account, having been made upon cheques drawn by the plaintiffs on the defendants, payable to various persons or their order, the endorsements of which by those persons were, as the plaintiffs allege, not genuine but forged.

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The defendants resist the plaintiffs' claim on two grounds :

(1) That in the circumstances under which they were issued all the cheques were payable to fictitious or non-existent persons within the meaning of sub-section 3 of section 7 of the Bills of Exchange Act, 1890, and were therefore payable to bearer ;

(2) That if they are to be treated as payable to the order of real payees, the defendants were justified under all the circumstances in paying them and debiting them to the plaintiffs' account.

I will deal first with the second of these contentions, for if it is made out, it will be unnecessary to consider the first.

There is no doubt upon the evidence that the proceeds of all the cheques came into the hands of a man named Niblock, who was the assistant superintendent of the plaintiff company, having his office at Ottawa, and were appropriated by him to his own use by means of a system of fraud and forgery on his part.

The cheques were issued for the purpose of paying supposed claims of the several persons in whose favour they were drawn, under policies of insurance made by the plaintiffs, and in the belief by the plaintiffs that the persons upon whose lives the policies had been granted had died ; but in fact none of them had died, and there was no real claim by any of the beneficiaries against the plaintiffs.

In all of the cases, except five (those of Burns, McKendry, Coghill, Miller and Little) the applications on which the policies were issued were entirely fictitious, the names of the supposed applicants, and of the supposed signers of the documents which accompanied them, being forged.

In all of the cases the signatures to the proofs of loss were also forged, as were the indorsements purporting to be those of the payees of the cheques.

In the five cases of the genuine applications, the policies had lapsed before the dates when the lives were said to have dropped and the claims were made.

The claim papers were in all the cases forwarded by Niblock from Ottawa to the head office of the plaintiffs at London, and shew on their face that they were in part at least prepared by him.

With the exception of two (each for \$1,000) all the insurances were in the Industrial branch, and for small sums.

Niblock was appointed assistant superintendent on the 23rd August, 1892, and the earliest of these fraudulent claims was received at the head office of the plaintiff company on the 25th February, 1896.

He had under his agreement with his employers, which is in writing, somewhat extensive powers; but nothing is said in it as to any connection he should have with the settlement and payment of claims under policies issued in respect of the insurances effected through his office.

It was, however, the practice whenever a claim was sent in from his office, after it had been passed, to send him the cheque for the amount of it, payable to the claimant or supposed claimant, or his order. It was his duty to deliver the cheque to the person in whose favour it was drawn, and to obtain from him a discharge of the claim under the policy in settlement of which it was given. According to the evidence of the plaintiffs' accountant Niblock sometimes paid a claim in money, and in such a case returned the cheque for it to the plaintiffs.

It was the practice of the plaintiffs not to notify the claimants that the cheque had been sent in the case of an insurance in the Industrial branch, but to do so where the insurance was not in that branch. Whether or not notices had been sent to the supposed claimants in the two cases of insurance of the latter character was not shewn, but it is probable from the testimony given at the trial that notice was not sent in those cases.

Each of the cheques is indorsed with the name of the payee of it; all of them except two (McKendry's and Hale's) are also indorsed by Niblock—his name following that of the payee; of the cheques thus indorsed three have above the name of Niblock, the word "witness."

It was not shewn to whom or how the moneys which were paid on the cheques were paid.

All of the supposed claimants lived or were represented to live at or in the vicinity of Ottawa, and the cheques were all payable at any branch bank of the defendants, and were paid through their Ottawa branch.

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The proper conclusion upon the testimony is, I think, that all the cheques were paid by the defendants in good faith and upon the representation of Niblock, acting for the plaintiffs, that the persons to whom payment was made were the persons named in the cheques as payees of them. No distinction in this respect ought to be made, as I think, between the cheques upon which Niblock's name was endorsed and the two upon which it does not appear. With regard to the former, there is the representation in writing by Niblock that the name indorsed as that of the payee is the genuine signature of the payee, for that I take to be the effect of his indorsement; and as to the latter, though there is not the same kind of representation, there was, I think, equally a representation to the same effect, for the proper inference is as to those that Niblock wrote the name of the payee intending that the defendants should accept and act upon them as their genuine signatures.

What was done as to these two cheques was the same, I think, as if Niblock in each case had gone to the defendants' bank with some one whom he represented to be the payee, and had, upon that representation, induced the officers of the bank to pay the cheques as bearing the genuine indorsements of the real payees.

Assuming this view to be correct, are the plaintiffs affected by what was done by Niblock, so as to preclude them from disputing the right of the defendants to pay the cheques and charge the amount paid to the plaintiffs' account?

In my opinion they are. Niblock was the representative of the plaintiffs at Ottawa, having the sole conduct and supervision at that point of all the business done through his office. The cheques were sent to him in order that delivery of them to the person for whom they were intended might be secured, and that proper discharges might be obtained from them of the company's liability on the policies in respect of which they were issued. The plaintiffs knew, or ought to have known, that their bankers would in all probability require the persons presenting the cheques for payment to be identified as the persons named as the payees of them, and that Niblock was the most likely, or at least a likely person to be called upon to do that, and as to most of the cheques they had notice

that Niblock was in fact certifying to the bankers the genuineness of the indorsements. It was not shewn that the practice of Niblock so certifying was exceptional in these particular cases; and the fair inference is, I think, that he did this throughout the period of his agency, which, as I have said, began in the year 1892; but if that inference ought not to be drawn from the testimony given at the trial, I would give leave to the defendants to shew what the fact is in that regard.

It would, as it seems to me, be a startling thing, at all events to business men, if it were to be held that a banker paying the cheques of his customer under circumstances such as existed in this case should be bound to suffer the loss occasioned by the fraud committed by the person whom the customer had entrusted with the powers and duties which were entrusted to Niblock. I am not, I think, required to so decide, but am warranted in holding that the loss must fall, where, in my opinion, in justice it ought to fall—upon the plaintiffs.

Having reached this conclusion, it is unnecessary to consider the otherwise important and also very difficult question raised, as to the payees of the cheques being fictitious or non-existent persons within the meaning of sub-section 3 of section 7 of the Bills of Exchange Act, 1890.

The action is dismissed with costs.

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Feb. 11.

MILLAR V. KANADY.

Limitation of Actions—Solicitor—Retainer—Termination of—Costs Subsequent to Judgment.

The employment of a solicitor to bring or defend an action, subject possibly to his right to claim payment of his costs on judgment being given, does not terminate on the giving of judgment, so long as anything remains to be done which it is the solicitor's duty under his retainer to do for his client's protection; and even, in the absence of such duty, where he does not elect to treat the contract as then at an end, but under his client's instructions acts for him thereafter in subsequent proceedings consequent upon the judgment, there is a continuation of such original contract.

Where, therefore, after the giving of judgment in an interpleader issue the solicitor for the defendant against whom judgment had been given, continued, with the client's knowledge, to act for him in the taxation of the plaintiff's costs, and in the preparation and taxation of certain costs which the defendants were entitled to set-off, his appointment continued until the completion of these proceedings, so that as against a claim for the amount of his bill of costs the statute of limitations only commenced to run therefrom.

THIS was an appeal by the plaintiffs from the judgment of the county court of the county of York, pronounced on the 9th January, 1902, dismissing the action with costs after the trial of it before Judge Morgan, sitting without a jury.

On February 20th, 1902, before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON and LOUNT, JJ., the appeal was argued.

W. R. Smyth, for appellants. The learned county court Judge was of the opinion that the plaintiff's retainer ended with the judgment, and, therefore, as six years had elapsed since the recovery of the judgment, the action was barred. The retainer, however, does not necessarily terminate with the judgment. It continues so long as there remains anything to be done to properly work out the judgment. There was a duty imposed upon the solicitor to protect the interests of his client on the taxation, and see that the costs were properly taxed. His omission to do so would have rendered him liable in an action for negligence. The case of *Rothery v. Munnings* (1830), 1 B. & Ad. 15, might lead to the conclusion that the retainer terminated with the judgment, but that decision

depended upon the particular facts of the case; and all the recent cases shew that so long as there is something required to be done by the solicitor for the client, the retainer continues: *De La Pole v. Dick* (1885), 29 Ch. D. 355; *Callow v. Young* (1886), 55 L.T.N.S. 543; *Browning v. Savine* (1877), 5 Ch. D. 511; *Lizars v. Dawson* (1872), 32 U.C.R. 237; *Hett v. Pun Pong* (1890), 18 S.C.R. 390; *Leve v. Abbott* (1849), 4 Ex. 588. Judgment means all acts ancillary to and necessary to judgment; and therefore, even assuming that the cases properly decide that the retainer terminates with the judgment, this would include attendances as to the costs and their taxation.

J. R. Roaf, for respondents. The case of *Rothery v. Munings*, 1 B. & Ad. 15, expressly decides that the retainer ends with the judgment, and it has never been overruled, but has been affirmed in all the subsequent cases. In all the cases referred to on the other side, there is some distinguishing feature which took them out of the general rule, as for instance, circumstances which constituted a continuation of the retainer: *Darby & Bosanquet* on the Statute of Limitations, p. 39.

February 11. MEREDITH, C.J.:—The action is for the recovery of solicitors' bill of costs, and the defence, which was given effect to in the county court, is the statute of limitations

The costs were incurred in an interpleader proceeding instituted by the Lake Erie and Detroit River R. W. Co., in respect of certain lumber claimed by the respondent company and by one Fox, which resulted in an issue being directed in which Fox was plaintiff and the respondent company were defendants.

The issue appears to have been tried before the junior Judge of the county court of the county of Essex, who decided it in favour of Fox, and ordered the respondent company to pay the costs of the proceedings. From his report the respondent company appealed, and the appeal was heard in Chambers by my late brother Rose, who made an order on the 7th December, 1894, dismissing the appeal with costs, from which he directed to be deducted the costs of an unsuccessful motion which had been made on behalf of Fox to quash the appeal.

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The taxation of the costs of the railway company, which the respondent company were directed to pay, was proceeded with, and after several attendances by the agents of the appellants on behalf of the respondent company, which were made after the 29th December, 1894, the taxation was completed on the 12th January, 1895, the bill being taxed at \$38.10. This sum was sent by the respondent company to Mr. LeVesconte, one of the appellants' firm, on the 24th January, 1895, and by him forwarded to the railway company's solicitors on that or the following day. The taxation of the costs, which were directed to be paid by the respondent company to Fox by the order of the 7th December, 1894, was also proceeded with after the 29th December, 1894; and on the 11th January, 1895, objections to certain items of the bill of these costs were served by the agents of the respondents on the solicitors for Fox, and there was a good deal of correspondence between the solicitors as to these costs, extending over the intervening months and down to 13th November, 1895, on which day Fox's solicitor acknowledged the receipt by letter of the day before from Mr. LeVesconte of \$57.50 in full of these costs.

The present action was begun on the 29th December, 1900, and the only services claimed for, which were performed on or after the 29th December, 1894, are those relating to the taxations of costs to which I have referred, and the payment of them.

It is plain from this statement of the facts that the appellants continued to act as solicitors for the respondent company in the interpleader proceedings down to as late a date as the 12th November, 1895, and that they did so with the knowledge of their clients, and there does not appear to have been any break in the proceedings, but the services were continuous, and in respect of matters which were the ordinary incidents of the litigation according to the usual and regular course of proceeding. It was clearly the duty of the solicitor acting for the respondent company on their behalf to attend the taxation of the railway company's costs, and to attend to the taxation of the costs which were payable by the respondent company to Fox, and to prepare a bill of the costs which the respondent company were entitled to set-off against the costs so

payable by them, and to see that a proper sum was allowed in respect of them.

It is not disputed that the statute of limitations did not begin to run until the completion of the work which the appellants were employed to do for the respondent company; but it was contended by the respondents' counsel, that for this purpose, according to the decided cases, the work was completed on the 7th December, 1894, when the order dismissing the appeal was made, and that the whole bill for services rendered more than six years before this action was begun was therefore barred, and this contention prevailed in the Court below.

Upon the argument before us, counsel for the appellants contended that the work which they were employed to do, on the facts of this case, included the work which was done after the 28th December, 1894, in respect of the taxation and payment of the costs; that this being done in accordance with the regular and ordinary practice and procedure, and without any break in the proceedings, and being, moreover, done in the discharge of a duty which the solicitors owed to their client, the work of the solicitors was not completed until the 12th November, 1895, and no part of the bill was therefore affected by the statute of limitations.

The law as to the application of the statute of limitations to a solicitor's bill of costs is thus stated in Poley's Law of Solicitors, p. 481: "Time begins to run from the completion of the work, or the determination of the retainer by the client, or the solicitor on reasonable notice and for reasonable cause: subject to exception in Chancery, and administration suits and other matters not being ordinary common law actions, that there may be certain natural breaks when a solicitor would be entitled to deliver a bill. In such cases it is assumed that an action would lie at the option of the solicitor, after delivery of a bill as from the occurrence of the break, but if no bill were delivered time would begin to run from the completion of the matter as in an ordinary common law action."

This statement of the law is supported by the authorities cited by the author, though *Harris v. Quine* (1869), L. R. 4 Q. B. 653, is erroneously referred to as *Harris v. Jones*, note 1.

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What, then, was in this case the completion of the business which the appellants were employed to do for the respondent company? It was argued, as I have said, for the respondents that the business was completed when the order of the 7th December, 1894, was made. No doubt general statements are to be found in the cases to the effect that in the case of a common law action the termination of it is reached when judgment is pronounced; and in *Rothery v. Munnings*, 1 B. & Ad. 15, it was held that the statute of limitations barred the claim of a proctor suing for his bill of costs in an admiralty proceeding, although within six years before action, but after sentence, the proctor had attended the adverse proctor in reference to the costs which his client was ordered to pay, in consequence of the former's letter informing him of his intention to take out process of the Court for the payment of the costs. Lord Tenterden, after stating that there was no doubt that the proctor had a right to call for the amount of his bill when the suit was terminated by a sentence, says that the proctor's duty was then concluded unless something should occur to require his further interference, which was quite uncertain; that the receipt of the letter and consequent attendance was a mere accident, and concludes his judgment with the following statement: "As, therefore, his right of suing on the items now in question accrued at the time of the judgment, and was not enforced within six years, I think he was not entitled to recover beyond the amount given at the trial."

Bayley, J., did not see any connection between the last two items and the rest of the bill, and Parke, J., thought as the right accrued when judgment was given, the statute was a bar.

I refer thus fully to this case to shew that what was decided was not that in all cases the giving of judgment is the termination of the suit, but only that on the facts which existed in that case the giving of judgment terminated the proceeding in which the proctor was retained to act.

That the giving of judgment is only *prima facie* the termination of the suit is stated by Blackburn, J., in *Harris v. Quine*, at page 658; and, referring to the facts of that case, he adds: "But when an appeal is brought, and the same attorneys continue to conduct the suit on appeal, that is a continuation

of the original suit, and what *prima facie* was a termination of the contract, ceases to be so."

Cockburn, C.J., at page 657, referring to the argument that the suit was terminated when it was dismissed in the Court below, and that the statute of limitations began to run from that time, says: "If nothing had taken place after that judgment, and the other items of the bill had no reference to the suit, that would be so; but as soon as the defendant instructed the plaintiffs to appear for him in the appeal, and they did so, it is nothing more nor less than a continuation of the original suit, although the plaintiffs might have refused to go on;" and Lush, J., expressed his agreement with what had been said, which he states to be "that the conduct of the suit on appeal is but the continuation of the original contract to conduct the suit *ad finem*."

Lady de la Pole v. Dick, 29 Ch. D. 351; *Callow v. Young*, 55 L.T.N.S. 543; *Cordery on Solicitors*, 3rd ed., p. 109; *Hett v. Pun Pong*, 18 S.C.R. 290, at p. 293, *per* Strong, J., may be referred to as establishing that the duty of the solicitor extends much further than in some earlier cases was thought. See *Lizars v. Dawson* (1872), 32 U.C.R. 237.

The principle recognized in these cases is that until judgment has been worked out there is a duty imposed on the solicitor on the record to defend his client against any improper steps taken for the purpose of enforcing the judgment, and what Rolle, C.J., said in *Lawrence v. Harrison* (1654), Sty. 426, which in *De la Pole v. Dick* is adopted as a correct statement of the law, is as follows: "The only question is whether the warrant of attorney be determined by the judgment given in the suit wherein he was retained; and I conceive it is not, for the suit is not determined, for the attorney after the judgment is to be called to say why there should not execution be made out against his client, and he is trusted to defend his client as far as he can from the execution.

In *Lady de la Pole v. Dick* and *Callow v. Young*, the question determined was as to the solicitor continuing to represent the client *as between him and the opposite party*; but the principle on which the decisions proceeded is that which I have mentioned, and applies, I think, to the question presented for decision on this appeal.

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The result of the cases appears to me to be that where the employment is to bring or defend an action, subject possibly to the right of the solicitor to claim payment of his costs if he chooses to do so when the judgment is given in the action, the business which he is employed to do is not completed so long as there remains to be done anything which it is the duty of the solicitor to do under his retainer for the purpose of issuing execution or protecting his client therefrom, or the like; and that even where there is no such duty, if the solicitor does not elect to treat the contract as at an end, but, under the instructions of his client, acts for him after judgment is given in a subsequent proceeding in the action consequent upon the judgment, such as the taxation of the costs which are by the judgment payable to or by the client, what is done is, to use the language of Lush, J., in *Harris v. Quine*, but a continuation of the original contract to conduct the suit *ad finem*.

Applying, then, what I take to be the rule to be deduced from the cases to the facts of this case, it appears to me that the proceedings taken by the appellants for their clients, the respondent company, in respect of the taxation of the costs payable by and to the respondent company under the order of 7th December, 1894, by the authority and on the instructions of the clients, and which followed promptly after the making of the order, and which it was the duty of the appellants to take for the protection of their clients, were taken under the original contract or as a continuation of it, and make the point at which the statute of limitations began to run not the date of the order but the time of the completion of those proceedings.

It is further to be observed that the business which the solicitors were in this case employed to do was not the bringing or defending of an ordinary action, but defending their client's claim to the lumber which was in question, and protecting his interests in the interpleader proceedings, and included, therefore, in my opinion, all that should be necessary to be done to protect the interests of the client in regard to the costs which might be dealt with in the interpleader proceedings.

For these reasons, I am of opinion that the appeal should be allowed with costs, and the judgment of the Court below

reversed, and instead thereof judgment be entered for the appellant with costs.

If there be any question as to the amount for which the judgment should be entered, it may be spoken to.

MACMAHON and LOUNT, JJ., concurred.

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[DIVISIONAL COURT.]

THE ONTARIO ELECTRIC LIGHT AND POWER COMPANY.

v.

THE BAXTER & GALLOWAY COMPANY, LIMITED.

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Feb. 16.

Contract—Supply of Electric Power—Continued Existence of Property—Condition Precedent.

Where under the terms of an agreement the plaintiffs were to supply the defendants with electric current to a specified amount of horse power in the premises of the defendants, to be used by them for operating their machinery and for use in their business, and for no other purpose:—

Held, that such limitation was for the purpose of confining the use of the power to the defendants' premises, and not to any existing mill thereon, and the fact that such mill was afterwards destroyed by fire did not dispense with the defendants' obligation to receive and pay for the power.

Taylor v. Caldwell (1863), 3 B. & S. 826, distinguished.

THIS was an appeal by the defendants from the judgment of the county court of the county of Wentworth, in favour of the plaintiffs after the trial of the action before the senior Judge of that Court, sitting without a jury, on the 12th February, 1902.

On May 9th, 1902, the appeal was argued before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J.

Teetzel, K. G., for the appellants. This case turns on the construction of the contract made between parties. The meaning of the contract is that the plaintiffs were to supply to the defendants the specified power for their mill, meaning the mill

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then in existence, and it was a condition precedent to the carrying out of the contract that the mill should continue to exist. When the mill was destroyed by fire and therefore ceased to exist, performance became impossible. The case comes within *Taylor v. Caldwell* (1863), 3 B. & S. 826, and that class of cases. See *Nickoll v. Ashton Edridge & Co.* (1901), 2 K.B. 126; *Howland v. Coupland* (1876), 1 Q.B.D. 258; *Chapman v. Withers* (1888), 20 Q.B.D. 824; *Appleby v. Myers* (1867), L.R. 2 C.P. 651, 655; *Grant v. Armour* (1894), 25 O.R. 7; *King v. Low* (1901), 3 O.L.R. 234; *Farmer v. Goldsmith*, [1891] 1 Q.B. 544; Pollock on Contracts, 7th ed., p. 410; Eng. and Amer. Encyc. of Law, 2nd ed., vol. 1, p. 590. There is another answer to the action, namely, that the plaintiffs never tendered the power to the defendants.

G. Lynch-Staunton, K.C., for the respondents. The contract was to supply power to the defendants for their business. It was to supply the defendants' premises with power. No specific mill was mentioned, and so long as the plaintiffs are ready and willing to supply the power to the defendants they are entitled to be paid. It is no defence for the defendants to say that some specific mill has been destroyed by fire. The premises are still in existence, and that is all that is required. The case of *Taylor v. Caldwell*, 3 B. & S. 826, and the cases of that character do not apply at all. The only electric case that has been decided in this country is the *Ottawa Electric Company v. St. Jacques* (1901), 31 S.C.R. 636, but this was on the construction of the terms of a lease and does not apply here.

February 16. The judgment of the Court was delivered by MEREDITH, C.J.:—The claim of the respondents, as presented by their pleadings and at the trial, is upon a written agreement, for the supply of an "electric current, to the extent of fifty horsepower" by them to the appellants, bearing date the 20th August, 1900, and is to recover three instalments (less \$85.39 paid on account) alleged to be due by the appellants under a provision of the agreement which is in the following words:—

"The customers (*i.e.*, the appellants) agree to pay for the electric current supplied as aforesaid the sum of \$1,250 per annum, such sum to be paid in equal monthly payments on the last day of each month during each year of the said term of five years."

The defence of the appellants is that the agreement is, according to its true construction, one for the supply of electric current for a particular specified mill, and that it is, therefore, one coming within the rule laid down by Blackburn, J., in *Taylor v. Caldwell*, 3 B. & S. 826, which is thus stated: "Where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor;" and that the mill having been destroyed by fire on the 25th April, 1901, without default and before any breach of the agreement on the part of the appellants, performance of the agreement had thereby become impossible, and the parties were excused.

The respondents' contention is that the agreement is not to be construed as one for the supply of the electric current for a particular specified mill; and that for this reason and in any case because, as they contend, there must be taken to have been an implied warranty on the part of the appellants that the mill should exist, the rule invoked by them does not apply.

The learned county court Judge construed the agreement in accordance with the contention of the appellants; but held that there was an implied warranty on their part that the mill should exist during the term of the agreement (but for which he was of opinion that the rule laid down in *Taylor v. Caldwell* would have applied); and he accordingly directed that judgment should be entered for the respondents.

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I am, with great respect, unable to agree with the opinion of the learned Judge as to the true construction of the agreement.

The agreement of the respondents for the supply of the current is that they will "upon the conditions, and for the purposes, and within the limits" stated in the agreement, supply it for and to the appellants, "in the premises" of the appellants.

The learned Judge relied on this provision, taken in connection with that of the second paragraph, as indicating that the current was to be supplied for a particular specified mill, but I do not so read those provisions.

The second paragraph is as follows:—

"It is understood and agreed that the said electric current so to be supplied shall be used by the customers for the purpose of operating their machinery and for the purpose of obtaining power for use in their business as millers, and for no other purpose."

The object of this provision, as it appears to me, was to guard against the current being used by the customers for any other than power purposes for use in their own business as millers, and there is nothing in the provision, as I read it, to prevent the customers using the current for those purposes in any place to which they might choose after it was delivered to them, to transmit it, and certainly, nothing to confine the use of it by the customers to any existing mill on the premises to which it was to be brought by the respondents.

Having come to that conclusion, it follows that, in my opinion, the performance of the agreement has not become impossible, and the rule laid down in *Taylor v. Caldwell* is, therefore, inapplicable, and the destruction without default on the appellants' part and before breach, of the mill which was on the premises when the agreement was entered into did not put an end to the agreement.

The respondents were not, however, in my opinion, entitled to recover the monthly payments for which they claimed. The current was not supplied after the 25th April, 1901, it having been on that day cut off from the premises of the appellants if not by, certainly with the consent of, the respondents;

readiness to supply the current is not enough to entitle the respondents to recover, and it was for the current which they supplied under the agreement that the annual payment of \$1,250 in monthly instalments was to be made, and none was supplied. The respondents are, no doubt, entitled to damages for the refusal of the appellants to perform their contract, but that is not the form of their action, and there is no evidence upon which the damages can be assessed. Such evidence the respondents sought to give at the trial, but it was excluded, and properly so, because they were not suing for damages for non-performance of the agreement, but to recover the instalments which they claimed had become payable under the terms of it.

It follows that, in my view, the judgment cannot stand.

We ought not, however, under all the circumstances, to direct that the action be dismissed, but an opportunity should be afforded to the respondents to go down to trial again on amended pleadings.

The appeal will, therefore, be allowed, and the judgment reversed without costs, and a new trial directed, with liberty to the respondents to amend their pleadings as they may be advised, and the costs of the former trial will be costs in the cause to the party who is ultimately successful, unless the Judge before whom the action is tried otherwise directs.

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March 3.

THE METALLIC ROOFING COMPANY OF CANADA

v.

THE LOCAL UNION NO. 30, AMALGAMATED SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION AND OTHERS.

*Parties—Who may be sued—Status of defendants—Local Union—Service of
Writ of Summons.*

The right to maintain an action or the liability to be sued can only be by or against persons as individuals, or as a corporation or a partnership, or where individuals are carrying on business in a name other than their own, or where they have been given the capacity to own property and to act by agents.

A local union of workmen, a purely voluntary association, without such capacity, are not liable to be sued; and a writ served upon the agent was therefore set aside;

Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426, distinguished.

Where it clearly appears that the association sued is not an entity, which may be sued by the name it bears, it is more convenient to set aside the service of the writ on a motion made therefor, than to allow the case to proceed to trial with a certainty of its ultimate dismissal.

THIS was a motion by the Amalgamated Sheet Metal Workers' International Association, by way of appeal from an order made by Meredith, J., dated the 19th February, 1903, dismissing an appeal by them from an order of the Master in Chambers, dated the same day, dismissing their motion to set aside the service of the writ of summons on them, which was, or was attempted to be, effected by serving a copy of the writ upon one J. H. Kennedy.

The appellants were added as defendants, pursuant to an order of the Master in Chambers, dated the 24th December, 1902, and that order has not been appealed from.

On February 28th, 1903, the appeal was argued before a Divisional Court composed of MEREDITH, C.J.C.P., and MACLAREN, J.A.

J. G. O'Donoghue, for the appellants.

W. N. Tilley, for the respondents.

March 3. MEREDITH, C.J.:—The grounds upon which the motion to set aside the service of the writ of summons is based are :—

(1) That the appellants are neither a body corporate, nor a partnership, nor an individual carrying on business in Ontario in a name and style other than his own name, and are therefore improperly sued by the name by which they are designated in the writ of summons.

(2) That service upon J. H. Kennedy was not good service upon the appellants.

A corporation or an individual or individuals were the only entities known to the common law who could sue or be sued; to these have been added, by the Judicature Act and rules, two or more persons claiming or being liable as partners, who, if carrying on business in Ontario, may sue and be sued in the name of the firm of which they were co-partners at the time of the accruing of the cause of action, and any person—that is, a single individual—whether residing within or without Ontario, carrying on business within Ontario in a name or style other than his own name, who may be sued in such name or style. It is competent, however, to the legislature “to give to an association of individuals which is neither a corporation, nor a partnership, nor an individual, a capacity for owning property and acting by agents; and such capacity, in the absence of express enactment to the contrary, involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents:” *per* Farwell, J., whose judgment was approved and adopted by the House of Lords, in *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, at p. 429; and it was upon that principle that it was held that the defendants in that case, though not a corporation, nor an individual, nor a partnership, were liable to be sued by their quasi-corporate name in tort for the acts of their agents.

It is clear upon the material before us that the appellants, who are not sued as individuals, are neither a corporation, nor a partnership, nor an individual carrying on business in a name or style other than his own name, and it has not been made to appear, nor was it even suggested upon the argument, that

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they have been given by the legislature the capacity for owning property and acting by agents, such as in the *Taff Vale* case it was held that the legislature had conferred upon the defendants in that case.

In the *Taff Vale* case the question was raised on a summons for an interim injunction taken out by the plaintiff, and a notice of motion by the defendant society to strike out its name.

The motion to strike out the name of the defendant society was, I apprehend, made under Order 16, Rule 11, which corresponds with our Consolidated Rule 206, and no suggestion appears to have come from any quarter that the question raised might not properly be dealt with on such a motion, but it prevailed in the Court of Appeal in the *Taff Vale* case, [1901] 1 K.B. 170, and the order of that Court was reversed not because the mode which had been taken for the raising of the question was not the proper one, but because in the view of the House of Lords the defendant society was properly made a defendant in its quasi-corporate name.

I refer to the manner of raising the question in the *Taff Vale* case, because upon the argument I was much impressed by the contention of Mr. Tilley that a determination on an interlocutory application, such as that which the appellants have made in this case, as to the right of the respondent to sue the appellants by what, for want of a better designation I may be permitted to call their quasi-corporate name, was an inconvenient and unsatisfactory mode of dealing with such a question.

Further consideration has, however, removed that impression, and I have come to the conclusion that, at all events in a case such as this, where it appears clearly that the association sued is not an entity which may be sued by the name which it bears, it is a more convenient course to put an end to the litigation at the threshold of it than to permit it to proceed with the certainty that the ultimate result will be the dismissal of the action as against the body improperly sued.

I refer also to *Sloman v. Governor and Government of New Zealand* (1876), 1 C.P.D. 563, as bearing on this aspect of the case, and more or less on the general question, and to Snow's Annual Practice, 1903, 56 (Club).

It is not necessary to the success of the appellants in this case to go as far as it would be necessary to go to give effect to a motion on their behalf to strike out their names as defendants, which there might be difficulty in doing, as the order adding them as defendants had not, as I have said, been appealed against.

What the appellants complain of is that service has not been properly effected upon them, and in this they are, I think, right; and *Grossman v. Granville Club* (1884), 28 Solicitors' Journal 513, supports their contention.

The Consolidated Rules provide, as I understand them, a complete and exhaustive code of procedure as to the service of writs of summons both within and without Ontario. It has been so held as to the English rules providing for service out of the jurisdiction, although they do not contain a provision such as is found in our Rule 2; and the reasons for so deciding are, I think, quite as applicable to the rules providing for service within Ontario. The rules make provision for the mode of service in the case of individuals, of corporations, of partnerships, and of a person carrying on business in a name or style other than his own name, but none for the case of a voluntary association made a defendant, which is neither a corporation, an individual, a partnership, nor a quasi-corporate body, such as were the defendants in the *Taff Vale* case; and it follows, in my opinion, that there is no way in which such an association can be served with a writ of summons, and certainly no provision by which it may be served in the way in which it was attempted to serve the writ of summons in this case.

It is scarcely necessary to add that nothing that I have said is intended to imply or to suggest that if an actionable wrong has been done to the respondents by the appellants, relief may not be obtained in the manner pointed out by Lord Macnaghten and Lord Lindley in the *Taff Vale* case, and as it was obtained in *Linaker v. Pilcher* (1901), 84 L.T.N.S. 421.

For the reasons I have given, the order appealed from must be reversed, and instead thereof an order be made discharging the order of the Master in Chambers, and substituting for it an order setting aside the service which was attempted to be made

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D. C. of the amended writ of summons by delivering a copy of it to
1903 J. H. Kennedy as the agent of the appellants.

METALLIC As the point is a new one, there will be no costs here or
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MACLAREN, J.A., concurred.

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[IN CHAMBERS.]

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BURKHOLDER V. THE GRAND TRUNK RAILWAY COMPANY.

March 25.

Damages—Death by accident—R.S.O. 1897, ch. 135—Apportionment of between widow and children.

An action brought against a railway company by a widow on behalf of herself and four infant children, aged respectively seven, five, three and one year, to recover damages for the death of her husband through the company's negligence, was settled by the company paying \$4800. On application to a judge the amount was apportioned by giving the widow \$1200 and each of the children \$900, the widow also to be paid for the children's maintenance, \$200 a year for three years, the fact of the widow having already received \$1000 for insurance on the husband's life, being taken in consideration in apportioning her share.

THIS was an application for the distribution of a fund between a widow and children.

An action had been brought by the plaintiff on her own behalf, as the widow of one Burkholder deceased, and also as the next friend of her four infant children, aged respectively seven, five, three and one years, to recover damages from the railway company for the death of her husband through an accident which happened at a place called Wansted, through the alleged negligence of the defendants.

The action was settled upon payment by the defendants of \$4,800 and the costs of the action.

The widow had been paid \$1,000 insurance moneys on the husband's life.

On March 25th, 1903, a motion was made before BOYD, C., sitting in Chambers, for an order for the distribution of the

moneys amongst the widow and children. The widow claimed \$2,000 as her share, and also asked to have an annual allowance made to her of \$200 for the support and maintenance of the children.

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W. W. Osborne, for the widow.

D. L. McCarthy, for the railway company.

F. W. Harcourt, for the infants.

March 25. *BOYD, C.*:—In cases of death by accident, the damages are usually apportioned by the jury among those entitled to share, as provided by the statute, R.S.O. 1897, ch. 135. But in case the matter does not go before a jury, and a sufficient sum is paid into Court to satisfy the action, then it may be brought summarily before a Judge to make just distribution.

In *Sanderson v. Sanderson* (1877), 36 L.T.N.S. 847, Malins, V.-C.—a case where a widow and infant children were alike left unprovided for—applied the analogy of the statute of distribution, and gave one-third to the widow and the residue to the children.

In a later case—*Bulmer v. Bulmer* (1883), 25 Ch. D. 409 at p. 413—Chitty, J., while holding that the money should go to the next of kin, yet did not hold himself bound by the exact provisions of the statute of distributions. He laid down the principle that the distribution of the fund must not be one of equal division but in proportion to the damage sustained by those related to the deceased. That, indeed, is indicated by the title of the Act, which is “An Act for the compensation of families,” etc.

I am not to overlook the fact in this case that some provision has been made for the widow by the policy payable to her for \$1,000. In the *Bulmer* case the Judge gave two-eighths to the widow and one-eighth each to the six children. I think it fair in this case to allow the widow one-fourth of the \$4,800 = \$1,200; and to each of the four infants the sum of \$900 = \$3,600. Total, \$4,800.

The infants' shares are to be paid into Court, and out of that fund, as in Court, \$200 a year to be paid half-yearly to the mother for their maintenance for three years.

G. F. H.

[MEREDITH, C.J.C.P.]

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March 2.

• SMERLING v. KENNEDY.

Costs—Security for Costs—Præcipe Order—Waiver.

Where it is stated in the writ of summons that the plaintiff resides out of the jurisdiction the defendant may, even after delivering his defence and before issue is joined, obtain the usual præcipe order for security for costs.

AN appeal by the plaintiff from an order of the local Judge at Goderich, Holt, Co. J., dismissing her motion to discharge a præcipe order for security for costs issued by the respondent Violet Kennedy (one of the defendants) on the 19th of December, 1902, was argued before MEREDITH, C.J.C.P., on the 13th February, 1903.

Proudfoot, K.C., for the appellant.

J. H. Moss, for the respondent.

MARCH 2. MEREDITH, C.J.:—The appellant resides in the United States of America, as appeared by the endorsement on the writ of summons served upon the respondent, and she is not possessed of such property situate within the jurisdiction as relieves her from the obligation of giving security for costs according to the practice of the Court, but it is objected by the appellant that, though on a special application the respondent might be entitled to an order for security for costs, she had by delivering her statement of defence before the order was issued, waived her right to security, and that the præcipe order was therefore irregularly issued.

The practice of the Court of Chancery before the Judicature Act is stated by Mr. Daniell to have been that "in order to entitle a defendant to require security for costs from a plaintiff he must make his application at the earliest possible time after the fact has come to his knowledge and before he takes any further steps in the cause; therefore, where the fact of the plaintiff being resident abroad appears upon the bill he must apply before he puts in his answer or applies for time to do so, either of which acts will be considered as a waiver of the right to security": Daniell, 5th ed., p. 30.

The common law practice was different, and the order might be obtained at any time after appearance and before issue was joined.

When the Judicature Act came into force in this Province the old practice was superseded where it was inconsistent with the provisions of the Act or Rules, but where it was not so superseded the old practice had still to be followed. If there was a variance in the old practice of the Courts, that which was considered to be the most convenient was to prevail: *Newbiggin v. Armstrong* (1879), 13 Ch. D. 310.

By the Consolidated Rules of 1888, all previous rules and orders, except certain of them which are set out in a schedule, were rescinded, and all practice inconsistent with the Consolidated Rules was superseded, and for the first time it was provided that as to all matters not provided for in the Consolidated Rules, "the practice was, as far as might be, to be regulated by analogy thereto": Rule 3.

A similar provision is contained in the Consolidated Rules of 1897, and forms Rules 2 and 3.

Section 128 of the Judicature Act provides as follows: "Save as by this Act or by any rules of Court otherwise provided, all forms and methods of procedure which, prior to the 22nd day of August, 1881, were in force in any of the Courts whose jurisdiction then became vested in the said High Court, under and by virtue of any law, general order, or rule whatsoever, and which are not inconsistent with this Act or with any rules of Court, may continued to be used and practised in the said High Court of Justice, in such and the like cases, and for such and the like purposes as nearly as may be, as those to which they would have been applicable prior to the said date in the respective Courts of which the jurisdiction became so vested."

The result of this legislation and of the decisions is that (1) all practice inconsistent with the provisions of the Judicature Act and Rules is superseded; (2) as to matters not provided for in the Rules, the practice is, as far as may be, to be regulated by analogy to the Rules; (3) where the old practice is not superseded and it is not practicable to apply the analogy of the Rules, the old practice is still to be followed;

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Meredith, C.J. (4) where the old practice is to govern and there was a variance
 1903 between the chancery practice and the common law practice,
 SMERLING that practice is to prevail which is considered by the Court to
 v. be most convenient.
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The practice in England as to security for costs, since the Judicature Act, is that the Court has now a judicial discretion to direct at any time security for costs to be given: Daniell, 7th ed., p. 85.

This is the result of the English Order 65, Rule 6, which corresponds with our Rule 1201.

In England there is no rule like our Rule 1199, which enables a defendant, where it appears by the writ of summons or by an endorsement thereon that the plaintiff resides out of Ontario, to obtain an order for security for costs on præcipe at any time after he has appeared.

The reason for holding, following in this respect the English decisions, that our Rule 1201 has the effect of superseding the former practice would seem scarcely applicable to an order which is not made in the exercise of the discretion of the Court but is obtained by a defendant on præcipe, and if it is not applicable to such an order, the practice is either the old practice or is to be regulated by analogy to the Consolidated Rules.

I find it difficult to determine what the practice is by applying the test of analogy to the Consolidated Rules, and it seems to me that if the old practice is not superseded as to præcipe orders, as I think it is not, it is that practice which must govern, and if it is to do so, the common law practice is, in my opinion, the more convenient practice, and therefore that which must be followed.

This was the view of Sir Matthew Cameron, in *Bank of Nova Scotia v. LaRoche* (1883), 9 P.R. 503, and of the Master in Chambers (Mr. Dalton) in *Caswell v. Murray* (1882), 9 P.R. 192.

In *Small v. Henderson* (1899), 18 P.R. 314, Mr. Justice Osler expressed the opinion that an order for security for costs might be obtained at any time before judgment; he was not there, however, speaking of the præcipe order but, as I understand his observations, of a special application under Rule 1201.

The result is that in any aspect in which the question is looked at, the order now in appeal is not open to the objection which is made to it. If the principle of the English decisions is applicable to a *præcipe* order, the old practice as to such an order is superseded. If the practice is regulated by analogy to the Rules the same result is reached, for the only analogy which occurs to me is the practice on applications under Rule 1201, and if the old practice is not entirely superseded by Rule 1201, and the analogy principle is not applicable, the old common law practice applies and the delivering of the statement of defence was not a waiver of the right of the respondent to a *præcipe* order, and the order was obtained in due time, as it was issued before issue was joined.

The result is that the appeal fails and must be dismissed with costs.

If I had come to a different conclusion as to the regularity of the *præcipe* order, as the respondent is entitled to require the appellant to give security for costs, I should have dealt with the case as on a substantive motion under Rule 1201, and allowed the order to stand.

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[IN THE COURT OF APPEAL.]

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DILLON V. THE MUTUAL RESERVE FUND LIFE ASSOCIATION.

Jan. 26.

*Life Insurance—Application—Materiality of Answers—Evidence—Onus—
Bona fides.*

A defence to an action on a policy of life insurance was that the insured in his application, made in 1891, stated he was forty-one, whereas in fact he was forty-four :—

Held, that evidence of statements made by the insured many years before the application tending to shew his belief that he was born in 1850, for the purpose of shewing *bona fides*, was improperly rejected.

The jury found that the statement in the application that the insured was born in 1850 was untrue and was material, and although there was no evidence to that effect, that it was made in good faith :—

Held, that on these answers judgment should have been entered for the defendants, the onus being on the persons seeking to uphold the contract to prove the *bona fides* of the answers.

New trial ordered to permit plaintiff to adduce evidence of good faith which had been rejected.

THIS was an appeal by the defendants from the judgment of Britton, J., at the trial of this action, which was brought by Elizabeth Dillon, widow of the late John Dillon, on a policy of insurance on his life taken out in the Provincial Provident Institution, the liabilities of which company were assumed by the defendants. The defence to the action was fraud, concealment and misrepresentation in the application for insurance—(a) in respect of the applicant's health; (b) in respect of his age.

The case was tried at Owen Sound on February 25th and 26th, 1902, before Britton, J., and a jury.

Certain questions were submitted to the jury, who gave a verdict in favour of the plaintiff on all questions except as to the age of the insured, which they found had been wrongly stated, but not with intention to deceive. On this verdict Britton, J., entered judgment for the plaintiff, less the amount of difference in premium as provided by R.S.O. 1897, ch. 203, sec. 149.*

* R.S.O. 1897, ch. 203, sec. 149 (1)—Where the age of a person is material to any contract, and such age is given erroneously in any statement or warranty made for the purposes of the contract, such contract shall not be avoided by reason only of the age being other than as stated or warranted, if

The appeal was argued on November 28th, 1902, before MOSS, C.J.O., and GARROW and MACLAREN, JJ.A.

E. D. Armour, K. C., and *R. B. Henderson*, for the appellants, contended that the question here was not whether the misrepresentation was material to the health of the insured or made innocently by him, but whether an untrue statement was made which was material to the contract, and that the evidence was all in favour of its materiality: *Jackson v. Grand Trunk R.W. Co.* (1901), 2 O.L.R. 689, 32 S.C.R. 245; *Thomson v. Weems* (1884), 9 App. Cas. 671; *Jordan v. Provincial Provident Institution* (1898), 28 S.C.R. 554; *Connecticut Mutual Life Ins. Co. of Hartford v. Moore* (1881), 6 App. Cas. 644; *Confederation Life Association v. Miller* (1887), 14 S. C. R. 330; that R.S.O. 1897, ch. 203, sec. 144, did not apply because the contract was made previously to it, in 1891, and not renewed since the Act: *Long v. Ancient Order of United Workmen* (1898), 25 A. R. 147; that before the enactment of section 149 a statement of age where there was a warranty avoided the contract, and that the law has not been altered by the section except where there has been good faith, the onus of establishing which is on the plaintiff, who had given no evidence here: *Hayes v. Union Mutual Life Assurance Co.* (1879), 44 U. C. R. 360; *Cerri v. Ancient Order of Foresters* (1898), 25 A. R. 22; *Dolan v. Mutual Reserve Fund Life Association* (1899), 173 Mass. 197; that at all events there should be a new trial.

I. B. Lucas, and *W. H. Wright*, for the respondents, relied on R.S.O. 1897, ch. 203, secs. 144, 149, and referred to *Home Mutual Life Association of Pennsylvania v. Gillespie* (1885), 110 Penn. 84, 89; and *Corbett v. Metropolitan Life Ins. Co.* (1899), 89 N.Y. St. Rep. 775.

January 26. The judgment of the Court was delivered by MOSS, C.J.O.:—The main defences to this action were that in his

it appears that such statement or warranty was made in good faith and without any intention to deceive, but the person entitled to recover on such contract shall not be entitled to recover more than an amount which bears the same ratio to the sum that such person would otherwise be entitled to recover as the premium proper to the stated age of such person bears to the premium proper to the actual age of such person, the said stated age and the actual age being both taken as at the date of the contract . . .

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application, made on January 27th, 1891, the insured John Dillon untruly stated that he was born on August 24th, 1850, and was then forty-one years of age, the fact being that he was nearly forty-four; and, further, that in the same application, he untruly stated that he had not at the date of the application, and never had, the disease of abscess or of open sore, the contrary being the fact.

At the trial the defendants proved beyond reasonable doubt that the insured was in fact nearly forty-four years of age at the date of the application, instead of forty-one as therein stated.

Counsel for the plaintiff was proceeding to elicit evidence from James Clark, a witness called for the defendants, as to statements made by the insured many years before the application, tending to shew his belief that he was born in 1850, but objection was taken by counsel for the defendants, and the learned trial Judge having indicated his view as in favour of the objection, the witness was not allowed to answer fully.

We think that the evidence sought to be elicited was admissible for the purpose of shewing that the statement regarding his age made by the insured in the application was made in good faith and without intention to deceive, and that the witness ought to have been allowed to answer fully. There seems to us to be no valid objection to the admissibility of such evidence on the question of good faith, and the jury should have been allowed to hear all that the witness could say: *Fellowes v. Williamson* (1829), M. & M. 306; *Vacher v. Cocks* (1829), M. & M. 353; *Cerri v. Ancient Order of Foresters*, 28 O.R. 111, and in appeal, 25 A.R. 22-23; *Hargrove v. Royal Templars of Temperance* (1901), 2 O.L.R. 126.

At the conclusion of the evidence the learned trial Judge put certain questions to the jury, and amongst them the following, bearing on the question of age:—

1. Was the statement by the deceased that he was born on the 24th of August, 1850, untrue?
2. If not true, is that statement material except as to fixing the amount of premium?

3. Was any untrue statement made by the deceased John Dillon material to the contract of insurance, and if so, what statement?

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And, after considerable discussion, he added the following:

8. If you find that the deceased misstated his age, did he do so in good faith, believing it to be true, and without any intention to deceive the company?

Counsel for the defendants objected that there was no evidence on which the jury could find good faith and want of intention to deceive, but the learned Judge submitted the question, observing that the objection would still be open to the defendants.

The answers of the jury to these questions were as follows:

To the first—"Yes."

To the second—"No."

To the third—"That respecting his age."

To the eighth—"Yes."

Questions were also put on the second branch of the defence, and upon the answers to them and the answers above set forth, judgment was entered for the plaintiff.

Upon the appeal the defendants contended that the jury having by their answers to the second and eighth questions found that the statement made by the insured as to his age was material, and there being no evidence to support the finding of good faith and want of intention to deceive, judgment should have been entered for the defendants. Plaintiff's counsel took the position that under the pleadings, and in view of section 149 of the Insurance Act, R.S.O. 1897, ch. 203, the onus was on the defendants to shew want of good faith and an intention to deceive. But we do not think the language of the section warrants this contention. We think that where the statement as to the age is found to be material and untrue, an avoidance of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith and without intention to deceive. And it must lie upon the person seeking to uphold the contract to make proof of it.

The jury found that the statement was material and untrue, and on those findings the defendants were entitled to judgment in their favour if the jury could not properly find that the

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statement was made in good faith and without intention to deceive.

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But the plaintiff was interfered with and prevented from eliciting evidence on the point. And we think there should be a new trial to afford the plaintiff an opportunity of adducing evidence on the point.

As there is to be a new trial, we do not enter upon a discussion of the other branch of the case further than to say that we think it would have been more satisfactory if, in addition to or in lieu of some of the questions put to the jury, other questions framed in such manner as to obtain direct findings on the point of whether or not the statements made by the insured that neither at the date of the application nor previously thereto had he the disease of abscess or open sore, were untrue, and if so, whether such statements were material had been submitted to the jury. The question in the application is not whether the insured ever had an abscess or an open sore, but "Have you now (*i.e.*, at the date of the application) or have you ever had any of the following diseases or complaints?" And amongst others enumerated are "abscess" and "open sore."

And the opinion of the jury might very properly be taken upon the point of whether the existence of an abscess or open sore in earlier years was something material to be stated by the insured in answer to the interrogatories: *Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 41 U.C.R. 497, 3 A.R. 230, 6 App. Cas. 644.

We may say further that we think the question of materiality was properly left to the jury.

There will be a new trial; the costs of the former trial and of the appeal to be costs in the action.

A. H. F. L.

[BOYD, C.]

GRIFFITH v. HOWES.

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April 4.

Insurance — Life Insurance — Benevolent Society — Certificate — “Legal Heirs designated by Will” — Election.

A certificate issued by a benevolent society to a married woman on the 25th of October, 1892, provided that the benefit was to be payable to her “legal heirs as designated by her will.” She died on the 14th of November, 1892, leaving her husband and her three children her surviving. By her will, dated the 30th of September, 1892, she gave specific properties and legacies to her husband and each of her three children by name, the insurance to her executors “for the purpose of paying thereout all debts due by me,” and the residue to her children :—

Held, that the bequest of the insurance money to the executors was inoperative ; that it was payable to the three children as “legal heirs designated by will,” and that the children were not bound to elect between the benefits specifically given to them and the insurance money.

THIS was an action brought by the three infant children of Sarah Elizabeth Lowery, deceased, by their next friend, John Lowery, against the executors of the will of the said Sarah Elizabeth Lowery, for the construction of that will and for the determination of certain questions arising in the administration of her estate. The only question of general interest was as to the effect of the will upon insurance money payable under a benefit certificate issued in favour of the testatrix.

The testatrix on the 11th of November, 1889, being then the wife of one John A. Griffith and the mother of two children, Elizabeth Maud Griffith and John Arthur Griffith, obtained a certificate of membership in the Canadian Order of Chosen Friends, which certified that she was entitled to a benefit of not exceeding \$1000, payable after her death to her children, Elizabeth Maud Griffith and John Arthur Griffith. Her husband, John A. Griffith, having died, the testatrix married John Lowery, and on the 25th of October, 1892, being then the mother of another child, Lena May Lowery, she surrendered the certificate of the 11th of November, 1889, and obtained a new certificate in the same terms, except that the benefit was declared to be payable to her “legal heirs as designated by her will.” The testatrix died on the 14th of November, 1892, leaving the three children and her husband her surviving, and having made the will in question in this

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action, dated the 30th of September, 1892, with a codicil dated the 10th of October, 1892. By the will she directed payment of all her debts; gave to each of her three children by name specific properties and legacies; gave to her executors certain lots in the village of Parham and village of Sydenham in trust to sell them, and to apply the proceeds of sale as far as necessary for the purpose of paying off a mortgage made by her to one Warner; to pay \$300 of the proceeds to her daughter Lena; and to pay the balance to the three children. The will then continued: "My life insurance in the 'Chosen Friends' I give and bequeath to my executors for the purpose of paying thereout all debts due by me at my decease, including the mortgage made by me to one Warner." After some specific bequests to her husband, the testatrix left all the rest and residue of her estate to her brother "to be distributed by him to all or such of my children as he shall think proper;" adding, "And after all debts are paid the money remaining to be placed in the bank to the credit of my children." After the death of the testatrix the Order of Chosen Friends paid the money into Court, where it was when this action was brought.

The action was tried on the 2nd of April, 1903, at Kingston, before BOYD, C.

G. M. Macdonnell, K.C., for the plaintiffs.

W. H. Sullivan, for the defendants.

April 4. BOYD, C.:—The disposition by the will of the money is repugnant to the statute under which the insurance arises, by which it is declared that so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the creditors, or form part of the estate of the deceased: R.S.O. 1887, ch. 136, sec. 5, and by sec. 10 it is to be paid so as to be "free from the claims of any creditors." This woman's legal heirs were the three children of her body. She had designated them by name in the first certificate, and under the statute they would have taken equally: ch. 136, sec. 7 (1). It was competent on the birth of the last child for her to vary or alter the statutory appointment by extending the benefits of the insurance to the third child;

which would be the statutory result if the three had been simply named as beneficiaries: sec. 6. That is, I think, the legal result in this case. The disposal of the money by the will is inoperative, and the last certificate alone speaks, by which it goes to her legal heirs, and the three children answering that description are named and referred to in what I take to be a sufficient "designation" to carry out the wishes of the deceased as expressed in the certificate. In the Oxford Dictionary "designate" is defined as "to point out," "to point out by name or descriptive appellation." Here the will refers to "my son John Arthur Griffith," "my daughter Lizzie Maud," "my daughter Lena," and "my three children." I declare, therefore, that the insurance money and its accretions in Court go equally among these three children as "legal heirs designated" in the will pursuant to the certificate: *Moffet v. Catherwood* (1833), Alc. & Nap. 472; *Mearns v. Ancient Order of United Workmen* (1892), 22 O.R. 34.

It is argued that a case of election arises in respect of the clause in the will disposing of the insurance money to pay debts, by which the children must choose between the insurance money (given away from them by the will) and the other benefits validly given to them by the will. But I incline to think that the will does not present a case of election, though the claim to the insurance money under the certificate may be contradictory of the direction to pay debts therewith. See *Huggins v. Alexander* (1741), unreported, cited in *East v. Cook* (1750), 2 Ves. Sr. 30. The question arises only in respect of the mortgage debt due on the farm, but by the terms of the will the payment of that debt is primarily charged on the Parham and Sydenham lots. These were sold, and the proceeds applied as directed by the will, but a balance of \$347 was still left on the mortgage, which was paid by the executor, George Howes, out of his own money. Justice will be done by letting that stand as a charge on the farm in his favour, collectable when the two Griffith children attain 21. This will be without interest, as he is tenant and owner of the farm till that time. But on the general point as to election, though the cases are in conflict, I think the rule laid down by Pearson, J., in *In re Warren's Trusts* (1884), 26 Ch. D. 208, and followed by the

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Court of Appeal in Ireland in *In re Handcock's Trusts* (1889) 23 L.R. Ir. 34, is applicable. He says: "The ordinary case of election is when a testator attempts to give by his will property which belongs to some one else. Such a gift is not *ex facie* void." But when the gift is *ex facie* void it is the law which disappoints, and the attempted disposition is one forbidden by law. Here the statute controls and limits the destination of the insurance money, and the testatrix must be taken to know the law that her direction was nugatory, and the will is to be read as if the invalid clause were expunged: see *Hearle v. Greenbank* (1749), 1 Ves. Sr. 298, at p. 307.

[The learned Chancellor then dealt with some further questions not necessary to be reported, and continued:]

The costs, so far as the insurance money is concerned, of both parties to come out of that fund. As to the rest of the litigation let each party stand his own costs.

R. S. C.

[DIVISIONAL COURT.]

VOIGHT BREWERY COMPANY v. ORTH.

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1903

April 7.

Judgment—Default Judgment—Statement of Defence—County Court—Appeal—Interlocutory Order.

An order made in an action in a county court for service of notice of a writ out of the jurisdiction, provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." Within the twelve days an appearance in the usual form was entered, the following words being added: "The defendant admits only \$103 but otherwise disputes plaintiff's claim in this action:"—*Held*, that this was in effect a statement of defence; that filing was, under the order, all that was necessary, and that a judgment entered for default of defence was void.

A motion by the defendant to set aside the judgment as irregular and void was dismissed by the county court Judge, who gave the defendant leave, on payment of \$5, to move on the merits for leave to defend:—

Held, that this was a final order and that an appeal lay therefrom.

O'Donnell v. Guinane (1897), 28 O.R. 389, distinguished.

APPEAL by the defendant from an order of the junior Judge of the county court of Essex refusing an application to set aside as irregular and void a judgment entered in the county court of Essex for default of defence.

The plaintiffs were an American company carrying on business out of the jurisdiction, and the defendant was an American subject resident out of the jurisdiction. The action was brought to recover the amount of a judgment obtained by the plaintiffs against the defendant in a justice's court at Detroit, with interest and costs; and on an allegation that the defendant was the owner of property within the Province of Ontario of the value of \$200, an order was made by the junior Judge of the county court of Essex allowing the plaintiffs to serve notice of the writ upon the defendant. This order provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." A statement of claim was not filed or served with the notice of writ, and within the twelve days the defendant entered an appearance in the usual form, adding to it the following words: "The defendant admits only \$103, but otherwise disputes plaintiffs' claim in this action." No notice of appearance or copy of the appearance was served on

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the plaintiffs' solicitor, and judgment was entered in favour of the plaintiffs for the full amount of their claim as in default of defence, and execution was issued upon this judgment. The defendant then moved to set aside this judgment as irregular and void, no grounds being specified in the notice of motion. An affidavit of the defendant was filed in support of the application, and contained the general allegation that he had a good defence on the merits. The motion was dismissed by the learned junior Judge, because, as stated by counsel, the grounds of irregularity should have been set out in the notice of motion, and the order dismissing the motion provided that upon payment of \$5 within ten days, the defendant should have liberty to move to set aside the judgment on the merits.

The appeal was argued before a Divisional Court [BOYD, C., MACLAREN, J.A., and FERGUSON, J.], on the 6th of April, 1903.

F. E. Hodgins, K.C., for the appellant. The defendant has complied with the terms of the order, and the judgment in question is clearly irregular, there having been what is really a defence duly filed. If the order had been in the usual form, requiring the delivery of a defence, service of the defence would have been necessary, but under this order, filing the defence is sufficient. Interest and costs having been claimed in general terms, the indorsement of the writ cannot be treated as a special indorsement: *Soules v. Stafford* (1894), 16 P.R. 264; *Clarkson v. Dwan* (1896), 17 P.R. 206; and a statement of claim was therefore necessary. If the indorsement were a special indorsement, and it was intended to treat the writ so specially indorsed as equivalent to a statement of claim, then the order should not have provided for appearance and defence on the same day. The judgment is not merely irregular, but is a nullity and should be set aside unconditionally: *Clarkson v. Dwan*, 17 P.R. 206, at p. 214; *Hoffman v. Crerar* (1899), 18 P.R. 473; *McVicar v. McLaughlin* (1895), 16 P.R. 450.

E. S. Wigle, for the respondents. There is no appeal from the order in question, which is not a final order but merely interlocutory. Nothing was decided except that the motion was not in proper form, and the dismissal is without prejudice to another motion being made: *O'Donnell v. Guinane* (1897),

28 O.R. 389. The order is right, for the irregularities intended to be relied on were not mentioned in the notice of motion, and this is essential:

Hodgins, in reply. The order is a final one, and an appeal lies: *Jenking v. Jenking* (1884), 11 A. R. 92, at p. 95; *Bank of Minnesota v. Page* (1887), 14 A.R. 347; *Baby v. Ross* (1892), 14 P.R. 440.

April 7. The judgment of the Court was delivered by BOYD, C.:—Within the twelve days the defendant entered an appearance and therewith filed a plea in these words: “The defendant admits only \$103, but otherwise disputes plaintiffs’ claim in this action.” This step was taken in strict pursuance of the Judge’s order, which was served upon the defendant. It is a proper pleading according to division court standards, and is essentially a defence according to a higher standard, though of somewhat novel simplicity. However, it was disregarded, and final judgment was signed for want of delivery of a defence and execution issued thereon. Under the order the defendant was not called on to deliver his defence but only to file it, and with this defence on the record the judgment is a nullity.

According to proper practice under the rules, there should have been simply an appearance entered, and that to be followed by a statement of claim, unless the defendant notifies the plaintiff that he does not require such statement to be delivered: Con. Rules 171, 243, and 245. But the plaintiffs seem to have adopted a more compendious way by their order, and are bound by the terms of it.

In another aspect the notice filed was sufficient, as a disputing of the amount claimed under Con. Rule 176, and could not be utterly disregarded in any way of viewing the proceedings.

The defendant then moved against the judgment as being void and irregular, and an order was made by the county court Judge dismissing the application with costs. As a favour, it was added that on payment of \$5 in ten days, the defendant might move to set aside the judgment on the merits.

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It is objected that no appeal lies from this order under the statute because it is in the county court and is not a final order: R.S.O. 1897, ch. 55, sec. 52. But the order is in its nature final, not interlocutory. It in effect declares conclusively while it stands that the judgment is good and valid, and can only be disturbed by an application to get in on the merits as a favour.

But the defendant answers: I am already in on the merits: my defence is of record, and has not been disposed of, and till it is, any judgment is illegal and void. The order is final as to the validity of the judgment in law, and the proffer of an alternative to the defendant, which he did not seek by his motion, does not reduce it to something merely interlocutory: see *Babcock v. Standish* (1900), 19 P.R. 195.

The appeal is therefore allowed, and costs of motion and appeal are to be taxed to the defendant and set off against the amount which he admits is owing to the plaintiffs.

Had the judgment been moved against for irregularity alone, *O'Donnell v. Guinane*, 28 O.R. 389, would have proved a formidable obstacle to the defendant.

We need not consider the question raised as to the special indorsement.

R. S. C.

[DIVISIONAL COURT.]

COBBAN MANUFACTURING COMPANY v. LAKE SIMCOE HOTEL
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April 8.

Mechanics' Lien—Costs—“Actual Disbursements”—R.S.O. 1897, ch. 153, sec. 42.

The “actual disbursements” which, by section 42 of the Mechanics' Lien Act, R.S.O. 1897, ch. 153, may be allowed as against an unsuccessful claimant in addition to an amount equal to twenty-five per cent of the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and *a fortiori* not counsel fees charged by the solicitor himself when acting as counsel.

Judgment of FALCONBRIDGE, C.J., affirmed.

APPEAL by the defendants from an order of Falconbridge, C.J., K.B., made on the 3rd of March, 1903, dismissing an appeal by them from a certificate of taxation by the senior taxing officer at Toronto of their costs in proceedings taken against them by the plaintiffs under the Mechanics' Lien Act.

The only question of general interest in the appeal was whether counsel fees incurred during the course of the proceedings were “actual disbursements” within the meaning of section 42 of the Mechanics' Lien Act, R.S.O. 1897, ch. 153. All the fees in question but one had been earned by a member of the firm of solicitors acting for the defendants, and the remaining fee in question had been paid by the firm of solicitors to counsel on an interlocutory application. The taxing officer held that the counsel fees of both kinds were not disbursements within the meaning of the section, and his ruling was affirmed on appeal.

The appeal was argued before a Divisional Court [BOYD, C., MACLAREN, J.A., and FERGUSON, J.], on the 6th of April, 1903.

A. E. H. Creswicke, for the appellants. The counsel fees are disbursements within the meaning of the section. This has long been settled in alimony actions, and the same rule ought to apply here: *Bucke v. Bucke* (1874), 21 Gr. 77. The question has been considered in Manitoba under a similar Act, and it has been held there that counsel fees are disbursements: *Robock v. Peters* (1900), 13 Man. L.R. 124.

W. D. Gwynne, for the respondents. Counsel fees paid by the client to the solicitor are not disbursements within the

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section of the Act, which evidently refers only to payments apart from costs. *Bucke v. Bucke*, 21 Gr. 77, turns on a special agreement to pay solicitor and client disbursements, and the general practice in alimony actions is the other way: see, among other cases, *Lalonde v. Lalonde* (1885), 11 P.R. 143; *Knapp v. Knapp* (1887), 12 P.R. 105; *Gallagher v. Gallagher* (1897), 17 P.R. 575. The fee in question in *Robock v. Peters*, 13 Man. L.R. 124, was paid upon an appeal under special circumstances.

Creswicke, in reply.

April 8. The judgment of the Court was delivered by BOYD, C.:—The special legislation about mechanics' liens was framed with a view to expedite the proceedings and reduce the adverse costs of litigants. A statement of claim begins the action, and a speedy trial is contemplated, which takes substantially the form of a reference: R.S.O. 1897, ch. 153, secs. 31 and 35. It is provided that liens of whatever amount shall be realized by proceedings in the High Court: sec. 39; but the safeguard as to all litigation is that the costs are limited to twenty-five per cent. of the claim of the plaintiff and other claimants: secs. 41 and 42.

As to the matter of examination: the taxing officer has disallowed the defendants' costs of cross-examining the plaintiffs for discovery. While I think it is competent to have such examination in proper cases, it is still for the taxing officer to say whether the costs should be taxed against the opposite party. In this case he has ruled that the examination was not a reasonable thing under the circumstances he has mentioned, and from that there is not an appeal. (See also sec. 43 of the Act.)

The matter of more difficulty is whether under the language of sec. 42 the defendants can tax counsel fees as actual disbursements. The provision is that where costs are awarded against the plaintiff, such costs shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claim *besides actual disbursements*.

Now, where as in this case the solicitor is also the counsel, no question of actual disbursements can arise. The hand to

pay and the hand to receive are the same. *Disbursements* are contrasted with *costs* in the section, and "disbursements" is used with reference to the solicitor and not to the client. What the solicitor is called upon *virtute officii* to pay out is styled "disbursements." He is not called upon to pay himself a counsel fee, and the taxing officer was right in holding it could not be included in the term "disbursements."

A small sum, \$5, was said to have been actually paid by the solicitor to a Toronto counsel on some interlocutory application, and that is in fact a disbursement, though I incline to think not such a disbursement as would be properly payable by the solicitor by virtue of his office. It would be payable by him as agent of his principal, as I have endeavoured to point out in *Armour v. Kilmer* (1897), 28 O.R. 618.

While in England the payment of counsel is the proper duty of the solicitor, whether supplied with funds or not by the client, that is not the relationship between these two officers of the profession in this country.

The line of demarcation as to "disbursements," as employed with reference to solicitors, is well drawn in the certificate of the taxing officers set forth at length in *In re Remnant* (1849), 11 Beav. 603, at p. 611. Those payments only which are made in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform, ought to appear as professional disbursements in the bill of costs, and other disbursements ought to be included in a separate cash account. In England "counsel fees" are regarded as professional disbursements by the solicitor whether furnished with money or not by the client, but in this Province counsel fees, if paid by him, are so only as the agent of the client, and should not be included in the bill of costs, which is confined to "fees, charges, or disbursements, for business done by a solicitor as such:" R.S.O. 1897, ch. 174, sec. 34.

This distinction between payment as agent and professional payment as solicitor is well marked in England to the present time, as expounded in *In re Remnant*. See *In re Kingdon and Wilson*, [1902] 2 Ch. 242, and *In re Backwell and Berkeley*, [1902] 2 Ch. 596.

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I think the "disbursements" of sec. 42 of R.S.O. 1897, ch. 153, are restricted to professional disbursements, and do not include fees paid to counsel by the solicitor as agent of his client.

In another point of view the same result is reached. The special Act as to liens incorporates by reference the ordinary procedure of the Court except as varied by the Act. That directs us to look to the Consolidated Rules and Forms for an explanation of such words as "costs" and "disbursements." Rules 1178 and 1179 provide for costs and for disbursements respectively, and refer to the tables or tariffs in the appendix. Tariff A. is that as to costs, and includes in its provisions the scale allowed as to counsel fees. Tariff B. as to fees and disbursements provides, among other things, for the allowances to be paid to witnesses, which are strictly professional disbursements.

According to this test, "costs" includes counsel fees, whereas "disbursements" is applied to witness fees and other payments which go to persons other than of the legal profession.

This result accords generally with the scheme of the Act, which is, for one thing, to keep down the costs falling upon the unsuccessful parties. Matters of division court competence may be brought in the High Court, and it was not contemplated that counsel fees in such cases should be levied from the other side, under the heading "actual disbursements." Counsel fees are not unseldom the largest items in the bill of costs, and if these were allowed in full, while other costs are reduced to twenty-five per cent. of the amount claimed, the purpose of the Act would be greatly frustrated.

The taxing officer might have allowed fees for three days' attendance to the special witnesses, as the sittings were for two days and extended beyond midnight of the first day; but, as we dismiss the application without costs, we do not interfere on this ground.

The practice of the Court as determined in alimony cases is not intended to be affected by this decision.

[STREET, J.]

SMART V. DANA.

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April 4.

Sheriff—Bond—Predecessor in Office—Annuity out of Revenues.

Pursuant to the terms of his appointment a sheriff and two sureties gave a bond to his predecessor in office to pay him an annuity "out of the revenues of the said office:"—

Held, that fees received by the sheriff as returning officer at elections of members of Parliament, and commission earned by him as assignee for the benefit of creditors, formed part of the revenues of the office, and that as far as the revenues of each year so ascertained extended, after deducting necessary disbursements connected with the office during such year, the annuity for that year was payable.

ACTION tried before STREET, J., at the Ottawa Winter Assizes on the 24th of January, 1903, without a jury. The facts are stated in the judgment.

J. A. Ritchie, for the plaintiff.

Aylesworth, K.C., and *M. M. Brown*, for the defendants.

April 4. STREET, J.:—The action was brought by the former sheriff of the united counties of Leeds and Grenville against George A. Dana, the present sheriff of those counties, and W. H. Comstock and Jas. Cumming, upon a bond given by Dana, as principal, and the other two defendants, as sureties, to the plaintiff for \$10,000, under the following circumstances:—

By letters patent under the Great Seal of the Province, dated the 1st of November, 1898, the defendant Dana was appointed sheriff of the said united counties "in the room and stead of James Smart, Esquire" (the present plaintiff) "resigned," and the following condition appears on the face of the letters patent: "Subject to the condition that you the said George Augustus Dana shall during your occupancy of the said office, commencing on the 1st day of November, 1898, pay to the said James Smart out of the revenues of the said office so long as the said James Smart shall live, at the rate of \$1200 per annum payable monthly, such monthly payments to be made on the 15th day of each month at the court house in the said town of Brockville, the said James Smart having held the said office for many years and owing to the infirmities of old age

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coupled with disabilities from an accident being no longer able to personally discharge the duties of the same."

On the 28th of January, 1899, the three defendants entered into the bond, upon which the present action is brought, to the plaintiff, conditioned in the penal sum of \$10,000 for the due performance of the terms of the condition in the letters patent, which condition is recited in the bond.

The defendant Dana received during the following periods the gross amounts set opposite them from his office of sheriff, not including moneys he received for acting as an assignee for the benefit of creditors, nor as returning officer, and after deducting the disbursements of his office for salaries, bailiffs' fees, etc., the net profits are those also set opposite the periods :

	Gross.	Net.
1st Nov., 1898, to 31st Dec., 1898.....	\$ 248 00	\$ 132 00
During the year 1899.....	2420 16	1688 56
" " " 1900.....	2170 43	1478 11
" " " 1901.....	1976 48	1180 70
1st Jan., 1902, to 18th March, 1902.....	182 36	35 93

and during the same period the defendant Dana paid to the plaintiff:

1st Nov., 1898, to 31st Dec., 1898....	\$ 134 00
During the year 1899.....	1200 00
" " " 1900.....	1200 00
" " " 1901.....	1070 70
To 18th March, 1902.....	34 60

During the same period the defendant Dana also received the following sums as assignee for creditors under R.S.O. 1897. ch. 147 :

During the year 1899.....	\$218 54
" " " 1900.....	871 48
" " " 1901.....	127 00

and the following sums as returning officer :

Dominion Election, April, 1899.....	\$60
" " November, 1900.....	60

On the 18th of March, 1902, the defendant Dana resigned his position as sheriff for the purpose of avoiding any further liability under the bond and under the conditions of his

appointment; he was reappointed by letters patent dated the 24th of April, 1902, in which no conditions are imposed.

The plaintiff contended at the trial that the word "revenues" in the bond meant gross and not net revenues, and that the sums received by the defendant Dana as assignee for the benefit of creditors and as returning officer were to be taken into account in arriving at his revenues from the office of sheriff; and further that Dana did not escape further liability by resigning his office. He asked for judgment for the amount of the penalty of the bond either as liquidated damages or as security for breaches under the statute of Wm. III., and that damages for the breaches should be assessed down to the time of the trial. He also insisted that deficiencies arising from insufficient revenues in one year might be made good out of surplus revenues of another year.

The present action was brought on the 11th of April, 1902, and as the defendant Dana had only resigned his office on the 18th of March, 1902, and is willing to account under the terms of the bond to that date, the amount at present recoverable is not affected by any consideration as to the effect of the resignation upon future instalments.

The bond is good, coming as it does within the exception created by sec. 11 of 49 Geo. III. ch. 126, as to annual payments out of the fees of an office to a former holder of the office when the amount so payable shall be stated in the patent of appointment.

The word "revenues" used in the letters patent must, I think, be construed to mean the income of the office after deducting the necessary disbursements connected with it; such disbursements must be made from the receipts in any event, and if the balance remaining is less than the amount of the plaintiff's annuity, it is evident that the whole annuity cannot be paid out of it; therefore, all he can claim is the balance, for his annuity is payable only out of the fund.

The Act 49 Geo. III. ch. 126, sec. 11, only legalizes an *annual* reservation charge or payment to the former holder of the office payable *out of the fees, perquisites or profits of it*, and as the whole section creates an exception to something declared illegal by the remainder of the Act, the exception

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should be strictly construed. The payment to be made is to be set aside annually, and I think that to give proper effect to the restrictions with which the exception is fenced, it should be held that the annual sum to be paid is intended to be reserved, and paid out of the revenues of the year in which it becomes payable, and not out of those of any other year, in whole or in part.

The remaining question is whether receipts by the sheriff as assignee for the benefit of creditors and as the returning officer at the election of members for the House of Commons are to be treated as "revenues of his office" within the meaning of the letters patent.

The word "revenues" must be treated as the equivalent of the language used in sec. 11 of 49 Geo. III. ch. 126, which is "fees, perquisites or profits"; and as a sheriff is bound by subsec. 4 of sec. 14 of R.S.O. 1897, ch. 147, to act as assignee if required to do so, I think the allowances made to him as assignee are "perquisites or profits" of his office and are therefore part of the "revenues" of it within the meaning of the letters patent and bond.

* I have had more doubt as to whether his fees as returning officer come within the same rule, because the duty to act if called upon to do so is cast upon him by a Dominion Act, 63 & 64 Vict. ch. 12, sec. 14, and he is a Provincial officer. He, however, accepts the office subject to the duty of acting as returning officer if a writ is addressed to him, and the allowance resulting from the appointment must, I think, be treated as a perquisite or profit derived from his office. Perhaps the question may be tested by considering whether I should be bound to hold that an annual allowance to a retiring sheriff reserved to him by his successor out of the profits derived by him from acting as assignee and returning officer was illegal as not coming within the Act 49 Geo. III. ch. 126. Unless I should be bound so to hold, I must hold these sources of revenue to be within the terms of the present bond.

The plaintiff in his statement of claim has set out the bond and assigned breaches; in his prayer for judgment he has claimed the whole \$10,000, or in the alternative a judgment for the amount in arrear, and general relief.

I think the plaintiff is entitled to judgment for the penalty of the bond, \$10,000. I assess the damages to the issue of the writ at \$131.23, with interest from the 31st of December, 1901, on \$129.30, and on \$1.93 from the 18th of March, 1902, and order execution therefor, and I stay execution on the \$10,000 until further damages shall be assessed for breaches, if any, occurring after the issue of the writ in the present action. The plaintiff to have costs of the action on the High Court scale.

R. S. C.

Street, J.

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D. C.

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March 30.

SMALL

V.

THE AMERICAN FEDERATION OF MUSICIANS.

Contempt of Court—Stay of Proceedings—Party Appealing in Contempt—Rights of Parties in Contempt.

Motion by the plaintiff to stay a pending appeal from a judgment dismissing an application to set aside service on an individual for the defendant Federation on the ground that the Federation was not an incorporated body or a partnership and could not be served as a body, for the reason that the Federation were in contempt for disobedience of an injunction :—

Held, following *The Metallic Roofing Company of Canada, Ltd. v. The Local Union No. 30, Amalgamated Sheet Metal Workers' International Assoc'n.* ante 424, that the Federation were not a body capable of being sued or being served, and if so they are not capable of being enjoined or of committing a contempt and that as the very object of the appeal was to determine whether they can be sued and served with process it could not be determined whether a contempt had been committed without hearing the appeal.

Held, also, that the rule is not universal, that persons guilty of contempt can take no step in the action; a party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself, and as the defendants here were ordered to appear within ten days, on pain of having judgment signed against them, they had the right to shew if they could, that the service upon them was not permitted by the practice.

Motion refused, under the circumstances without costs : *Fry v. Ernest* (1863), 9 Jur. N.S. 1151, and *Ferguson v. County of Elgin* (1893), 15 P.R. 399, followed.

THIS was a motion to stay an appeal by the defendants to a Divisional Court upon the ground that, by the acts of their president, they were in contempt for disobedience of an injunction.

The following facts are taken from the judgment of STREET, J., in the Divisional Court :—

An order was made in Chambers *ex parte* upon the application of the plaintiff allowing him to serve the defendant, D. A. Carey, substitutionally for the defendants, the American Federation of Musicians.

Those defendants applied in Chambers, upon notice to the plaintiff, to set aside the order upon the ground that not being an incorporated body, or a partnership, they could not be served as a body, and that no provision is made in the rules for allowing such service.

The Master in Chambers dismissed the motion, and the defendants appealed to Mr. Justice Meredith in Chambers, who dismissed the appeal.

The defendants then gave notice of an appeal to the Divisional Court, and set the appeal down to be heard at the sittings of the Divisional Court in February, 1903.

Before it came on to be heard, the plaintiff gave notice of a motion to the Divisional Court for an order staying the defendants' appeal upon the ground that the defendants, the American Federation of Musicians, were in contempt of Court for having disobeyed an injunction granted on 12th January, 1903, restraining the defendants from inducing, persuading, or ordering one Cresswell to refuse to continue in the plaintiff's employment, and to break his contract with the plaintiff.

The motion was argued on the 10th February, 1903, before a Divisional Court composed of FALCONBRIDGE, C. J. K. B., STREET, and BRITTON, JJ.

C. A. Moss, for the appeal. The evidence shews a flagrant and open contempt of the injunction by one Webber, the president and chief executive and active officer of the defendants, the Federation, for whose acts they are responsible, and until that is purged the appeal should not be allowed to proceed: *Chuck v. Cremer* (1846), 1 Cooper's R. 247; *Hurd v. Robertson* (1857), 1 Ch. Ch. 3; *Clark v. Campbell* (1893), 15 P.R. 338; *Oswald on Contempt of Court*, p. 149; *Garstin v. De Garston* (1864), 34 L.J. P.M. & A. Cas. 45.

J. G. O'Donoghue, contra. If there is any contempt it is that of Webber only, and even if the Federation were held answerable for his acts, the other appellant, the local union, certainly can not be; and they are entitled to proceed with their appeal. A writ of sequestration might be issued: *Kerr on Injunctions*, 3rd ed., p. 647; but the proper remedy is an attachment: *Bloomfield v. Brooke* (1875), 6 P.R. 264; *Farwell v. Wallbridge* (1852), 3 Gr. 628; *Dundas v. Hamilton and Milton Road Co.* (1872), 19 Gr. 455; *McGarvey v. The Corporation of the Town of Strathroy* (1883), 6 O.R. 138. Con. Rule 858 makes the proper provision. See, also, Con. Rule 473. There has been delay and acquiescence: *Kerr on Injunctions*, 3rd ed., p. 647.

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Moss, in reply, cited *Ferguson v. County of Elgin* (1893), 15 P.R. 399.

March 30. The judgment of the Court was delivered by STREET, J.:—Since the argument of this motion, it has been held by a Divisional Court that an association similar to that which the American Federation of Musicians claims to be, is not a body capable of being sued or of being served as a body under our rules of Court: see *The Metallic Roofing Co. of Canada v. The Local Union No. 30, Amalgamated Sheet Metal Workers' International Assoc'n.* (1903), 5 O.L.R. 424.

The object of the appeal sought to be stayed in the present case is for a similar determination with regard to the position of the American Federation of Musicians. If that body is not capable of being sued, and not capable of being served, clearly it is not capable of being enjoined or of committing a contempt: and as the very object of its appeal is to determine whether it can be sued and served with process, we can not determine whether a contempt has been committed by it without hearing the appeal. We should not, therefore, stay the appeal, in my opinion.

If, however, we could determine in advance of the appeal, that the appealing defendants have been guilty of contempt, I think we should still have been bound to refuse to allow the motion. The rule is not a universal one that persons guilty of contempt can take no step in the action: it is subject to several exceptions, one of which is, that the party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself. Here the defendants are ordered to appear within ten days to the writ of summons on pain of having judgment signed against them: and upon the authority of *Fry v. Ernest* (1863), 9 Jur. N.S. 1151, and *Ferguson v. County of Elgin*, 15 P.R. 399, they appear to have the right to shew, if they can, that the service upon them is not permitted by the practice.

The motion should, therefore, be refused: it appears, however, that the president of the body called the American Federation of Musicians, with full knowledge of the injunction, has made the most strenuous efforts to procure Cresswell to break his contract, and I think there should be no costs.

[DIVISIONAL COURT.]

RE JOHNSON.

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1902

Dec. 10.

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April 4.

Will—Devise—Proceeds of Realty and Personalty—For the Use of a Church—

A testator who died on the 12th April, 1895, by his will made the 6th September, 1894, directed land to be sold and out of the proceeds thereof and some personalty directed \$2,000 to be paid to N. W. for the use of the Reformed Presbyterian Church, such sum to be expended by N. W. in the manner best calculated by him to advance the principles of that church.

N. W. assigned the whole fund to the church :—

Held, a good charitable bequest.

Held, also, that the assignment by N. W. to the trustees of the church was a valid exercise of the discretion given him by the will.

Judgment of Boyd, C., affirmed.

THIS was an appeal by Jennie Ball and Elizabeth M. Rice, two of the legatees under the will of James Johnson, deceased, from an order made by the Chancellor of Ontario, on a motion by the executor of the said James Johnson, deceased, under Con. Rule 938.

The testator died on 12th April, 1895, and by his will, amongst other things, directed his executors to sell his real and personal estate, and out of the proceeds to pay to the Reverend Nevin Woodside the sum of \$2,000 for the use of the Reformed Presbyterian Church, such sum to be expended by him in the manner best calculated by him to advance the principles of that Church, and he bequeathed a legacy of \$500 to each of the appellants, Jennie Ball and Elizabeth M. Rice. The Reverend Nevin Woodside assigned the legacy to the church and died in 1901.

It was admitted that the legacies in question were in the result payable almost entirely out of the proceeds of land directed to be sold by the will in question, and that the fund being insufficient to pay all the legacies, there would have to be an abatement.

The motion was heard in Chambers on 8th December, 1902, before BOYD, C.

D. C. *W. M. Douglas*, K.C., for the executor.
1903 *D. W. Saunders*, for the trustees of the Reformed Presby-
RE JOHNSON. terian Church.
CHAMBERS *J. G. O'Donoghue*, for Jennie Ball and Elizabeth M. Rice
v. and other legatees.
JOHNSON.

December 10. *BOYD, C.*:—The testator made his will on 6th September, 1894, and died on 12th April, 1895, more than six months having elapsed between the testament and the death.

He directs land to be sold; and after the death of his wife, out of the mixed realty and personalty, he directs \$2,000 to be paid to the Reverend Nevin Woodside for the use of the Reformed Presbyterian Church. He adds such sum to be expended by Woodside in the manner best calculated by him to advance the principles of that church.

That is a bequest of moneys derived from lands to the Reverend Nevin Woodside as trustee for the church named, and it is valid under section 24 of the Religious Institutions Act, R.S.O. 1897, ch. 307.

The person named exercised the functions of his trusteeship by granting the whole fund to the church, where the fund was at home and should not be disturbed.

So far as the \$2,000 comes out of pure personalty, no objection can arise as to vagueness or perpetuity: *Attorney-General v. Lawes* (1849), 8 Ha. 32.

The devise or bequest to Mr. Woodside for the church is valid. Costs out of the estate.

From this judgment the defendants Jennie Ball and Elizabeth M. Rice appealed to a Divisional Court, and the appeal was argued on the 11th February, 1903, before *FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ.*

J. G. O'Donoghue, for the appeal. The trustee Woodside died in the year 1901, but before his death he had assigned the fund absolutely to the trustees of the church. That was a delegation of the trust reposed in him not authorized by the will. The church was not the *cestui que trust*. The fund was to be applied by the trustee in the way indicated by the testator.

The trusteeship was a personal matter, and he should have exercised a discretion, and he has divested himself of that power without authority under the will or by a Court: *Alexander v. Alexander* (1755), 2 Ves. Sr. 639, at p. 643. The fund consists partly of the proceeds of land, and if it is a charitable trust it offends against the Mortmain Act: *Page v. Leapingwell* (1812), 18 Ves. 463; *Ferguson v. Gibson* (1875), 22 Gr. 36; *Re Trust of John McDonald's Will* (1881), 29 Gr. 241. It is not within definition of a charity under the statute of Elizabeth (43 Eliz. ch. 4), or under R.S.O. 1897, ch. 333: *Re McCauley* (1897), 28 O.R. 610. Sec. 8 of R.S.O. 1897, 112, does not apply; the property in question was money derived from the sale of land, not "money charged or secured on land, or other personal estate arising from or connected with land." The terms of the gift are uncertain: *Vesey v. Jamson* (1822), 1 Sim. & S. 69. The devise may exceed the perpetuity limit: *Re The Trusts of the Will of Thomas Dutton* (1878), 4 Ex. D. 54. I refer also to *Kendall v. Granger* (1842), 5 Beav. 300; *Morice v. The Bishop of Durham* (1804), 9 Ves. (Ch.) 399; *Browne v. Yeall*, in note to *Moggridge v. Thackwell* (1792), 7 Ves. 36, at p. 50; Lewin on Trusts, 10th ed., p. 270; Tudor's Law of Charitable Trusts, p. 38.

D. W. Saunders, for the trustees of the church. The Chancellor has held the gift is valid under sec. 24 of R.S.O. 1897, ch. 307, and that the trustee has validly exercised the trust by handing over the fund to the trustees of the church. A gift to a church is not a private but a charitable trust, and where there is a clear charitable trust the law against perpetuities does not come into question: Lewin on Trusts, 10th ed., p. 18; *Re Clarke, Clarke v. Clarke*, [1901] 2 Ch. 110, at pp. 113 and 121. In *Re Dutton*, 4 Ex. D. 54 (cited by the appellant) the distinction is apparent: *per* Baron Huddleston at p. 58; *Cocks v. Mannors* (1871), 12 Eq. 574, at p. 585; *Thomson v. Shakespear* (1860), 1 D. F. & J. 399. The gift does not offend against the Mortmain Act: R.S.O. 1897, ch. 112. So far as the subject of the gift is personalty, it would always have been good, and sub-secs. 4 and 8 now protect it so far as it is land or the proceeds of land: *Manning v. Robinson* (1898), 29 O.R. 483. The words of the testator will be construed generously: *In re*

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Lea, Lea v. Cooke (1887), 34 Ch. D. 528. I refer also to *In re Barnett* (1860), 29 L.J.N.S. Ch. 871.

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O'Donoghue, in reply, referred to *Stewart v. Green* (1870), Ir. R. 5 Eq. 470.

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Street, J.

April 4. The judgment of the Court was delivered by STREET, J.:—I can find no grounds at all for allowing the present appeal.

The bequest to Mr. Woodside for the use of the church was a good charitable bequest for the advancement of religion: *Baker v. Sutton* (1836), 1 Keene 224, at p. 232; *Townsend v. Carus* (1843), 3 Ha. 257; *Thornton v. Howe* (1862), 31 Beav. 14, at pp. 19, 20.

These cases are easily distinguishable from *Stewart v. Green*, Ir. Rep. 5 Eq. 470, where the bequest was to the superiress of a community of ladies known as the Order of Mercy, “for the use and benefit of the said community,” thus taking the gift out of the public character required to make a good charitable use.

Being a good charitable bequest, it is not subject to the law against perpetuities: *In re Clarke, Clarke v. Clarke* [1901], 2 Ch. 110.

The testator died after 14th April, 1892, and so the case is governed by the 8th sec. of ch. 112, R.S.O. 1897, which exempts money arising from land from the operation of the Mortmain Act.

In my opinion the bequest was a good one, and the appeal should be dismissed with costs, payable out of the legacies of the appellants, and any balance to be paid by them personally.

G. A. B.

[MEREDITH, J.]

KRUG FURNITURE COMPANY V. BERLIN UNION OF
AMALGAMATED WOODWORKERS.

1903

April 2.

*Trade Union — Inducing Breach of Contract — Interference with Business —
Pleading.*

Damages are recoverable against a local trade union and the members thereof in an action by employers of workmen when by means of threats, abusive language, and a system of espionage, the workmen are induced to break their contracts of employment with the employers and other workmen are prevented from entering into the employment in their stead. And a foreign officer of an organized body of which the local trade union was a part, who came to this Province and aided, encouraged and directed the members in their unlawful acts, was held liable with them for the consequences.

After a trade union has appeared and pleaded in an apparently corporate capacity, it is too late at the trial to raise the objection that it is not in fact incorporated or liable to be sued. Such an objection must be specially pleaded.

THE plaintiffs, who carried on business at Berlin as manufacturers of and dealers in furniture, brought this action against the Berlin Union, No. 112, Amalgamated Woodworkers' International Union of America, certain members thereof, and one D. D. Mulcahy, for an injunction to restrain the defendants from interfering with the plaintiffs' workmen and from preventing workmen from entering into their employment, and also for damages for wrongfully and maliciously procuring the plaintiffs' workmen to break their contracts with the plaintiffs and to cease working for them. In August, 1902, on account of certain alleged grievances between the plaintiffs and some of their workmen, known as finishers, the defendant Union passed a resolution ordering a strike at the plaintiffs' factory, and the finishers thereupon ceased work. About two weeks later the woodworkers in the plaintiffs' employment also ceased work. The defendant Mulcahy came to Berlin from the United States as the representative of the American Union of Woodworkers, and under his direction, as stated in the judgment, a mode of procedure, the nature of which is indicated in the judgment, was adopted by the defendants to prevent the plaintiffs from employing men to take the place of the men who had left their employment.

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The action was tried at Berlin on the 17th of March, 1903, before MEREDITH, J., and judgment was reserved.

E. E. A. DuVernet, and *J. A. Scellen*, for the plaintiffs.

J. P. Mabee, K.C., and *E. P. Clement*, for the defendants.

April 2. MEREDITH, J.:—Every one who, without lawful justification or excuse, besets or watches the house, or other place, where any person resides, or works, or carries on business, with a view to compel such person to do, or abstain from doing, anything he has a right to abstain from doing, or to do, is guilty of a crime, and liable to fine or imprisonment.

Every one who breaks any contract; or knowingly and for his own ends, without justification, procures any other person to break any contract, or any innkeeper to disregard his legal obligation to afford reasonable accommodation to any traveller, is guilty of a wrong, for which he is answerable in damages.

All persons who make use of a public highway, or any other place, to the sensible discomfort of any person in the ordinary enjoyment of his house, or place of business, or to the injury of his property, are, ordinarily, guilty of a wrong, for which they are answerable in damages, and, from the continuance of which, they may be restrained by injunction.

So, too, that which is now-a-days called boycotting is, in some of its forms, very obnoxious to the law.

That the defendants were guilty of that crime and of these wrongs is, upon the evidence, very plain. Indeed it is, to a certain extent, admitted by them in their consent to the interlocutory injunction made against them in this action; for injunctions are not consented to by, and do not go against, persons who have not done, and do not intend to do, any wrong: see *Quinn v. Leathem*, [1901] A. C. 495; *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 88, and *J. Lyons & Sons v. Wilkins*, [1899] 1 Ch. 255.

Because of some disagreement between the plaintiffs and that class of mechanics in their employment known as finishers, the woodworkers, another class of mechanics in the plaintiffs' employment, left it and began that which they term a "sympathetic strike." No way directly concerned in the differences between the finishers and the plaintiffs, satisfied,

apparently, as to their own business relationship with the plaintiffs; yet, in order to aid their fellow-workmen the finishers, the woodworkers, in almost a body, left the plaintiffs' employment.

That they had a right to do, so long as they broke no contract; and no complaint is made in that respect: what is complained of is the subsequent conduct of the defendants.

Their main purpose in striking was to compel the plaintiffs to accede to the demand of the finishers. Their plan to effect that purpose, to force the plaintiffs to submit, was to prevent other workmen taking the places of the strikers, and to constrain such of the plaintiffs' workmen as had not left to leave their employment, and to prevent the sale of the goods made by them, so that the plaintiffs would be put in the position that they must submit or close their factory—in other words, to force them to choose between submission and ruin as a manufacturing concern.

Whatever may be thought of this purpose from any other than a legal point of view, so long as the workmen resorted to lawful means only, to accomplish a lawful object, they were quite within their right, and entitled to, and would receive the prompt protection of the law, from unwarranted interference at any one's hands; but any unlawful object, or unlawful means adopted by them to obtain a lawful object, should meet with equally prompt prevention and punishment in the courts of law.

One of the first acts of the workmen who had struck, and of other members of the organized body to which they belonged, the defendants "The Berlin Union, No. 112, Amalgamated Woodworkers' International Union of America," was to organize watches, composed of a number of the men, who were detailed for certain hours, beginning with the arrival of the earliest train upon the railway and ending with the latest, to beset and watch, every day, all trains, and to exercise an espionage over all passengers and luggage arriving at the railway station with a view to intercepting any one who might have the appearance of, or whose luggage might have the appearance of that of, a workman employed, or seeking employment, by the plaintiffs; and to beset and watch the plaintiffs' factory and premises,

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especially at such hours as the workmen were going to and from their work, for the purpose of preventing new workmen from entering the plaintiffs' employment, and of constraining their continuing workmen to leave such employment.

For over two months, and until after the interlocutory injunction order herein was made, this method of interference was combinedly and systematically kept up by a regular rotation of watches or detachments detailed for the purpose. The conduct of those who beset and watched the factory was often of an offensive and highly reprehensible character: the plaintiffs' workmen were insulted, obnoxious expressions and offensive noises were directed against them, and they were sometimes crowded off the sidewalk—conduct calculated to create a breach of peace by those who had the courage to resent it, and to intimidate and force from their employment those who had not; conduct which, upon the railway station, ought not to have been permitted by any well-conducted railway company; and conduct which, upon the public streets, ought to have been prevented by the peace officers of any well-conducted municipality.

It cannot be denied that such striking workmen as were employed by the day left without finishing their day's work, and that such of them as were employed upon piece work left without finishing their contracts (but, as before mentioned, no claim is now made in respect of these things); nor that at least one of the plaintiffs' new workmen was induced to break his contract by the defendants; nor that some of the defendants, detailed for that purpose, induced the innkeepers of the town to agree to disregard their legal obligation to afford reasonable accommodation to any traveller who might be coming to the town for the purpose of working for the plaintiffs: nor that there was an unlawful besetting and watching of the plaintiffs' factory. Indeed, there is no serious question upon the whole of the evidence of the commission by the defendants of all the wrongs first before mentioned.

In regard to boycotting, that mainly relied upon and proved was the intimidation of persons who bought and sold the product of the plaintiffs' factory. The woodworkers and finishers unions asserted that, through some means, they were

able to ascertain the destination of all furniture shipped by the plaintiffs, and their course has been to communicate with their friends at the place of destination with a view to the prevention of the purchase or sale of any of the plaintiffs' goods; and the result has, in one case at least, been an intimidation of the dealer to such an extent that he is afraid to disclose the facts except secretly. The defendants must be held to really intend that which is the plain effect of their actions—the injury of the plaintiffs by intimidation. No one is excused, by calling the weapons grass, when really throwing stones.

"A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful:" *per* Lord Lindley, in *Quinn v. Leathem*, [1901] A.C. 495, at p. 538.

"*Prima facie*, it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any manner regulated or restrained his mode of doing this, the law must be obeyed. But no power short of general law ought to restrain his free discretion:" *per* Alderson, B., in *Hilton v. Eckersley* (1856), 6 E. & B. 47, at p. 74.

Two things seem to me very important throughout conflicts between employer and employed: (1) that all parties to the strife should know the law affecting it, and (2) that every person concerned should be unflinchingly kept within its bounds.

The defendants may be divided into three classes: (1) the organized body acting under the name of "The Berlin Union, No. 112, Amalgamated Woodworkers' International Union of America," as a body, or all its members as a class; (2) the defendant Mulcahy, who is said to be the president of the whole body of the "Amalgamated Woodworkers' Union of America," of which the Berlin Union is but one branch; and (3) the other defendants, who are members, and some of them officers, of the smaller body, and were the more active of such members in the conduct of the strike.

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The defendants, the organized body, contend, apparently now, for the first time, that they are not an incorporated body, and that therefore the action should be dismissed as against them; but it seems to me to be too late to make any such point; it is but a technical objection, and one which ought not to be given effect to, to shield these defendants from wrongdoing, unless it can be insisted on as a matter of right. No encouragement should be given to any organized body to evade the consequences of its act by abstaining from obtaining corporate capacity or other legal existence; that is especially applicable to a large body such as these defendants, among other things having a common seal and a trade-mark, and carrying on, to a certain extent, the business of insurance against accident, and against loss by fire, among themselves. It is, as I have said, but a matter of form, for even if the organization have no legal existence as a body, it is not without the control of the law; all its members can be reached, and reached without difficulty, under our practice as it is by means of a class action. The application made at Chambers, and renewed at the trial, for the purpose of so reaching these defendants ought to be given effect to, if necessary.

But effect ought not to be given to this objection, for these reasons: these defendants have, without objection, appeared pleaded, and consented to the interlocutory order against them, by the name under which they are sued, and it is too late now to object. Besides this, the consolidated rules seem to me to require that the defence of *nul tiel corporation* shall be expressly pleaded. Reading Rule 281 in connection with Rule 280, that ought to be the effect given to the former rule. The wording of the rule is peculiar, but its purpose must, as it seems to me, be to require an express denial of incorporation before the corporate capacity of a party, sued or suing in such, can be questioned. These defendants are sued as, and alleged in the pleadings to be a corporate body and, though challenged by the plaintiffs to do so, did not apply for leave to plead so as to raise that question, for fear, perhaps, that the leave might be granted only upon the terms of allowing the plaintiffs to amend also, by making the action a class action as against the members of the union. The plaintiffs were not bound to prove

incorporation, and it cannot, upon the whole of the evidence, be said that that was impossible; it may be, notwithstanding the statement contained in the "constitution" to the contrary, that they are an incorporated body, or at least registered under the Trade Unions Act. This objection is overruled: see R.S.C. 1886, ch. 131; *Duke of Bedford v. Ellis*, [1901] A. C. 1, and *Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426.

As to the third class of defendants, they have, as I have said, been proved to have taken an active part in the wrongs which have been mentioned, and so are individually answerable for the injury done. All that was done, was the result of organized combined action on the part of the members of the union, under the leadership and encouragement of these individual defendants.

The remaining class of defendants comprises the defendant Mulcahy only. He was not one of the plaintiffs' workmen, nor a member of the local body, nor a resident of Berlin, but, indeed, is a foreigner. He was, however, the chief presiding officer of the whole organized body, and came to this country for the purpose of aiding, encouraging, and directing the operations of the striking workmen and their associates. He was present at their daily meetings, exhorting the strikers, and directing their plans and actions. He is answerable, and chiefly answerable, for the concerted acts of the strikers during the time he was with them. It is no answer to the plaintiffs' claim to say, that he was a stranger here, and unacquainted with the laws of the land. Before undertaking, or encouraging, any act aimed at the injury of another, and especially any act likely to cause a breach of the peace, he ought first to have ascertained whether it was lawful or unlawful, rightful or wrongful. I find that this defendant was a party to the unlawful and wrongful acts which were committed by his co-defendants, and is answerable, with them, for the consequences.

The plaintiffs, in my opinion, are clearly entitled to a perpetual injunction, restraining the defendants from unlawfully besetting or watching the plaintiffs' factory, and from

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all wrongful obstruction of, or interference with, the plaintiffs in their trade and business.

But the plaintiffs seek also substantial damages, and have proved a very serious loss in their business through the action of the defendants. The evidence, however, is not sufficient to enable me to see clearly just how much of that loss was caused by the wrongs of the defendants, and how much by acts done within their rights. A reference to assess damages was not asked. The best I can do with this question is to assess damages, against all the defendants, at \$100. That amount at least is clearly proven.

There remains the question of costs only to be dealt with. Costs as a general rule go to the successful party, and there is no reason for departing from that rule in this case. Indeed, the defendants by their conduct, in encouraging adjudged misconduct, by paying the fines of persons convicted of crimes in connection with the strike, have given additional cause for condemning them in costs.

The pronouncing of this judgment has been delayed at the request of counsel, made at the trial, to enable him to hand in any additional cases. The time given has now passed.

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[IN THE COURT OF APPEAL.]

LEE V. CANADIAN MUTUAL LOAN AND INVESTMENT COMPANY.

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Building Society—Mortgage—Mortgagor becoming Shareholder—Liability for Losses.

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It was held that, under the mortgage in question in this case and the by-laws and rules of the defendants and their predecessors in interest applicable thereto, the plaintiff was entitled to a discharge of his mortgage, given in form as collateral security for the payment of shares subscribed for by him, upon payment of the principal and interest as therein provided; and that the defendants could not charge against the mortgage a share of losses incurred in the management of the company.

Williams v. Dominion Permanent Loan Co. (1901), 1 O.L.R. 532, distinguished. Judgment of MacMahon, J., 3 O.L.R. 191, reversed.

AN appeal by the plaintiff from the judgment of MacMahon, J., reported 3 O.L.R. 191, was argued before ARMOUR, C.J.O., OSLER, MOSS, and GARROW, J.J.A., on the 11th and 12th of November, 1902. The terms of the mortgage in question and the provisions of the rules and by-laws applicable thereto are stated in the judgments.

W. J. Clark, for the appellant.

Shepley, K.C., and *A. McLean Macdonell*, for the respondents.

April 14. OSLER, J.A.:—I have had an opportunity of reading the opinion prepared by my brother Garrow and agree with it. I think the present case quite distinguishable, for the reasons he has given, from *Williams v. Dominion Permanent Loan Co.* (1901), 1 O.L.R. 532, by which the learned trial Judge thought he was bound. It is satisfactory, I must add, to be able to hold the defendants to the terms of the mortgage and to assure them that none of their rules enable or oblige them to cast upon a simple borrower losses incurred in the management or mismanagement of their business to the extent, as contended in this case, of more than half the sum lent him, after he had paid principal and interest in full according to the letter of his bond.

It is time that the Legislature took notice of such anachronisms as the defendant company and their like, with their fluctuating body of rules and complicated business methods. If

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it were not so serious a matter it would seem ludicrous that persons whose only object is to become borrowers and to pay off their loans by monthly instalments, should be made to become shareholders in the company with an uncommunicated promise of mythical profits and a certainty, if the defendants' contention were upheld, of liability to losses which would keep the loan unpaid for years no matter how punctually the borrower might have paid, as in this case he did pay, the stipulated instalments.

GARROW, J.A.:—The mortgage executed by the plaintiff, dated the 1st of December, 1891, to the Standard Loan and Savings Company, a building society incorporated under R.S.O. 1887, ch. 169, recites that the plaintiff is a member of the company, having subscribed for twelve ordinary shares, and has applied to the company to receive from them the sum of \$1,200, the maturity value of the said shares in advance prior to the same being realized, and has agreed in consideration of such advance to pay to the company the sum of \$18.49 monthly until the first Monday in November, 1899 (ninety-six payments in all), such monthly payments being made up of \$7.20 subscription on account of the said shares; \$4.80, being forty cents per share per month, bonus or premium for receiving payment of such shares in advance, prior to the same being realized, and \$6.49 being interest at six per cent. on \$1,200 until the first Monday in November, 1899, and has agreed to submit to the rules of the company; and to assign said shares to the company forthwith; and to execute the mortgage as collateral security for the due fulfilment of his said agreement and the performance of all his obligations as a member of the company. The proviso for payment is that "the mortgage is to be void upon the performance by said member of his hereinbefore recited agreement; and upon payment of taxes and performance of statute labour; and of the covenants and provisoes hereinafter contained." The mortgage contains a covenant that the mortgagor will duly and punctually make the several payments as aforesaid according to the above proviso; and also that he will observe and perform the by-laws and rules for the time being of the

company with respect to the said shares, and the payment of the said advance; and will pay all fines and forfeitures imposed on him under said rules and by-laws.

The only other covenant or agreement which should be noticed is one which states that "It is agreed . . . that the said advance of \$1,200 is made by the company to the said member as a privilege of such membership, and by reason of his having signed the said by-laws and rules, and assigned the said stock to the said company; and that these presents are taken as collateral security only, the advance being made upon the said stock, the provisions made as to the repayment thereof by the said by-laws and rules, and the hereinbefore recited agreement."

The application, dated the 7th of November, 1891, which preceded the mortgage, and which originated the transaction in question is headed "application for loan." The plaintiff thereby applied to the Standard Loan and Savings Company for the sum of \$1,200 from the funds of the said company, to be repaid in eight years, repayable as *per* the rules, terms, and conditions of the company. This application, as appears from an endorsement thereon, was accepted by the board of the Standard Loan and Savings Company on the same day; and the plaintiff on the same day signed a printed form of application "for twelve shares of stock" in the said company in which he had not previously held any stock. So that the subscription for stock was simply the mode selected by the company to carry out the proposed loan; a mode, apparently, inconsistent in that respect with the statement contained in the application, which is also upon a printed form in use by the company, which states that the security offered is "the following property" describing the plaintiff's lands as afterwards inserted in the mortgage. Indeed, there is not a word in the application from beginning to end indicating that the plaintiff in order to obtain the loan must become a member of the company or subscribe for stock. This, however, is now, in my opinion, a matter of no consequence for various reasons. No evidence is given of fraud, or of mutual mistake. True the plaintiff desired and intended to become a borrower only. He had no desire or intention to become a stockholder, but he

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knew, or must be taken to have known, that the company could only lend in the manner proposed, upon condition that he should first subscribe for stock. The form or expression in writing, of the transaction, he left to the company, and he did not afterwards complain that he had been deceived, or even that he did not understand that the effect of the transaction, or rather one of the effects, was that he would become a member of the company, and a subscriber for the twelve shares upon which the loan was made. So that, in my opinion, the matter must be now determined on the writings as they stand.

I have recited the material parts of the mortgage. There remain, as incorporated therewith, the by-laws and rules of the company.

The object of the company, as stated in their by-laws in force at the date of the mortgage in question, is to provide its members with a safe and remunerative investment for their monthly savings, and to enable them to purchase houses on easy terms of payment.

The capital stock is divided into three classes (1) ordinary ; (2) prepaid ; (3) fully paid up shares.

The shares subscribed for by the plaintiff were treated as ordinary shares, although not so termed in his application.

Ordinary shares are to be paid for in monthly instalments of sixty cents per share until the shares mature. Payment may be made in advance and a discount allowed.

Fifty-two cents of each monthly payment shall be credited to the loan and guarantee fund, and eight cents per share, together with the entrance fee, shall be credited to, and constitute, the expense fund.

Whenever the payment made on account of any ordinary share, together with the proportion of profits annually credited thereto, amount to \$100, such share shall be deemed to have matured ; and the maturity value of \$100 may be withdrawn on sixty days' notice, subject to certain exceptions of no consequence in this case. A member holding ordinary shares on which instalments due have been paid, may withdraw at any time after one year from his admission, upon sixty days' notice, and shall be entitled to receive the actual amount of the instalments paid in by him to the loan and guarantee fund on

said shares, with interest at five per cent. per annum after the first six months; and if he has paid instalments for two years or more, shall be entitled to receive in addition, two-thirds of all profits standing to the credit of his shares at their next preceding adjustment of profits. Prepaid shares are sold at \$50 a share, and mature by profits at \$100, when they are to be withdrawn.

Fully paid up shares are sold at \$100 and the holders thereof shall be entitled to receive a dividend at the rate of seven per cent. per annum, and shall not participate in profits beyond the seven per cent., and shall not withdraw before the expiration of two years.

The funds of the company may be loaned on the stock of the company with real estate mortgages as collateral security, or on the stock of the company which has been in force for two years.

Loans on stock with real estate mortgages as collateral security shall be repayable in ninety-six monthly payments. Loans on stock with real estate mortgage as collateral security may be paid off at any time after two years from the date of the mortgage, but on sixty days' notice. Loans on stock without other security may be paid at any time on giving sixty days' notice; in either case interest being charged only for the period during which the money is retained by the borrower.

Applications for loans shall be made in writing, on blanks to be provided by the company.

No loan shall be granted unless three months' instalments on stock shall have been paid, unless the directors decide to the contrary.

Provision is also made for advancing the loan in instalments, where the loan is to pay for an unfinished building, as in the present case.

These are, apparently, the matters contained in the by-laws and rules which should be read in conjunction with the mortgage, in order to ascertain the terms of the contract between the plaintiff and the Standard Loan and Savings Company.

On the 30th of November, 1893, the Standard Loan and Savings Company assigned all its assets, including this

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mortgage, to the defendants, a company incorporated under the same statute, and carrying on a similar business; and the defendants thereupon requested the plaintiff to sign certain papers prepared by the defendants, which he did. One was an application to withdraw his shares in the Standard Loan and Savings Company, the other an application for membership in the defendant company. The first named of these two documents is in the words following: "To the Standard Loan and Savings Company, Toronto. In accordance with the agreement entered into between the shareholders of the Standard Loan and Savings Company and the Canadian Mutual Loan and Investment Company, I hereby apply to withdraw all my shares as per certificate No. 182 in the Standard Loan and Savings Company, and direct that the amount to the credit of my said stock be applied in payment upon the stock in the Canadian Mutual Loan and Investment Company, to be allotted to me in pursuance of my application hereunder, and the said agreement.

Dated at Coleman, this 21st day of June, 1893."

And the other was simply an application for twelve shares of stock in the defendant company, dated on the same day. The plaintiff had attended no meetings of either company. He knew personally nothing about the agreement between the Standard Loan and Savings Company and the defendants; and, as he says, signed these documents when presented to him by the defendants, simply to, as he believed, enable the defendants to step into the shoes of the Standard Loan and Savings Company. The agreement between the Standard Loan and Savings Company and the defendants is set out in the statement of defence. It provides, among other things, that the net assets of the Standard Loan and Savings Company, including all the accrued profits to the date of the transfer shall, after payment of the liabilities of the company, be divided ratably among the shareholders in good standing of the Standard Loan and Savings Company, in proportion to the value of their shares on the date of the transfer, as a credit on the stock allotted to them by the defendants; and the defendants are to pay all the liabilities out of such assets.

The defendants may, in their discretion, make calls and levy assessments on the present shareholders of the Standard Loan and Savings Company, and generally do all acts and complete all business necessary to enforce all existing rights and obligations of the Standard Loan and Savings Company in the name of the Standard Loan and Savings Company, but at the risk, cost and expenses of the defendants.

It is argued by the defendants, that what took place created a complete novation, and that the matter must now be dealt with just as if the original transaction had been with the defendants and under their bylaws; but that contention is not, I think, entirely correct. What really happened amounted to this, that the Standard Loan and Savings Company as mortgagee, assigned the mortgage to the defendants, and it therefore seems to follow that what under the original contract the Standard Loan and Savings Company could have claimed, the defendants may now, as assignees of the mortgage, claim. There was no new advance, no new mortgage to the defendants, no new consideration moving from the defendants to the plaintiff as a foundation for altering or increasing his obligations under the original contract, or of making him liable to pay, in the end, more than the original contract called for. The matter must, therefore, in my opinion, be considered and treated now just as if the Standard Loan and Savings Company were the defendant here, and the plaintiff had come to redeem as against that company.

It is not in dispute that before the institution of this suit, the plaintiff had fully and punctually paid all the instalments mentioned in the mortgage; and that he is not in arrear for any fines or penalties or other specific sums of money. But the defendants' real contention is, that the shares for which the plaintiff subscribed have not yet matured; that the profits expected have not been realized; that, indeed, instead of profits, the Standard Loan and Saving Company made a large loss; and that although the plaintiff has already paid the sum of \$1,775.04, he must continue to pay until he pays \$631.94 more to enable the shares to mature; and they rely on their by-laws, which undoubtedly, as do those of the Standard Loan and Savings Company, provide that shares such as those in

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question shall mature when they reach \$100 by the aid of payments and profits. To this contention MacMahon, J., who tried the case without a jury, acceded. In his judgment the learned Judge apparently relies upon the case of *Williams v. Dominion Permanent Loan Co.*, 1 O.L.R. 532. But that case is, I think, unlike this in at least one material feature, viz., that there the agreement set forth in the mortgage was to *repay in monthly payments according to the by-laws and rules of the association*; the provision for payment was in monthly payments according to the tenor of the rules and by-laws, *until the shares shall have matured*; and the proviso for reconveyance is on repayment according to the rules and the provisions of the mortgage being complied with. In the present case the payments to be made are exactly specified. There are to be ninety-six monthly payments of \$18.49 each, and the proviso for reconveyance is "provided this mortgage is to be void upon the performance by said member of his hereinbefore recited agreement, and upon payment of taxes and performance of statute labour, and of the covenants and provisoes hereinafter contained." The "hereinbefore recited agreement" has been set forth, and need not be repeated. The covenant for payment is that "he will duly and punctually from time to time make the several payments as aforesaid, according to the above proviso; and also that he will observe and perform the laws and rules for the time being of the said association with respect to "the said shares and of the repayment of the said advance, and will pay all fines and forfeitures imposed on him under said rules and by-laws."

It must not be forgotten that there is here no question between the members and creditors. The questions are wholly as between investing and borrowing members *inter se*. Nor must it be forgotten that the application which the Standard Loan and Saving Company accepted was for a loan to be repaid in eight years. The rules of that company then in force provided that loans should be made at six per cent., and should be repayable in monthly payments extending over eight years, with the option of repayment in two years, in which latter event interest only for the time the money was kept would be charged. These rules are to be treated as if incorporated in the mortgage, and read as part of it. And they must be so read

and construed as to give the proper effect, not only to them, but to the other rules before quoted, which require payments upon ordinary stock to be made until with profits such stock matures. The plaintiff is a borrower not an investor. He was to pay, not to receive, and he was to pay until he had repaid the loan and interest. It is true he is called, and for many purposes is, a member, and, as such, is subject to the rules from time to time applicable to his case. But it is clear that both these classes of rules are not applicable to him. He must as a borrower, under an explicit rule, repay the loan and interest in eight years. The mortgage explicitly calls for ninety-six monthly payments, which he has duly made. *Primâ facie* one would think that should be an end of the matter, that having made the stipulated payments he is entitled to his discharge, and to a reconveyance of his land, which he only agreed to place in pledge for the eight years, and not for sixteen, or, it may be sixty years, if losses instead of profits are continuously made.

In my opinion, the proper way to apply both classes of rules is to read those which provide for payment until maturity as applicable to the investing member only, unless the borrowing member by his mortgage expressly agrees, as in the *Williams* case, to repay until the shares mature. To impute such an agreement here, however, is, I think, to contradict the express terms of the contract, which was in effect an agreement for a loan for eight years only, with the option to pay off at any time after two years, by paying the principal and interest at the stipulated rate, for the time the money had been kept.

The distinction between a borrowing member and an investing member, where there was, as here, no question of the rights of creditors, was pointed out very clearly in *Brownlie v. Russell* (1883), 8 App. Cas. 235; and in *Tosh v. North British Building Society* (1886), 11 App. Cas. 489.

A test of the situation in the present case may be made by supposing that at the end of two years the plaintiff had given the sixty days' notice required by the rules, and had tendered the principal and interest. Could the mortgagee in such case have said successfully, you must go on paying till

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the shares mature? I think very clearly not. Just as I think the mortgagee cannot at the end of eight years, when all the payments bargained for in the mortgage have been made, make a similar demand. The mortgagor, who is only, at bottom and as between himself and the company and the investing members, nominally in many respects a shareholder at all—(his shares are not even held by himself but by the mortgagee), when he pays back in the terms of the mortgage the loan, by that act at once, in my opinion, ceases to be a member or under any liability to the mortgagee. He is not two separate and distinct things, a borrower and a member or shareholder. The membership is subsidiary to the character of borrower; and when the latter character or relationship ceases, the former in such a case as the present also *ipso facto* ends, as if it had never been. In the absence of explicit by-laws to that effect, he has as between himself and the investing members no interest in the losses, although he is, like them, interested in the gains of the mortgagee, and of course is liable to the creditors of the company, if any, as a contributory with the other members; but he is under no similar obligation to the investing members. They must take their chances as between themselves and the borrowing members, unless under specific rules determining otherwise. Each payment a borrower makes is *pro tanto* a discharge of his liability, and cannot be recalled, nor losses charged up against him, unless under proper by-laws duly passed and applicable equally to all members. He is so far a member that during the period he has agreed to occupy the position of mortgagor or mortgagor-member, he is bound by the rules of the association in force when he joined or became a member; and is even subject to new rules properly and validly passed, so long as they are *intra vires* and do not alter his contract: *Bradbury v. Wild* [1893], 1 Ch. 377, at p. 385. In that case it was held that a new rule to levy an assessment to cover losses was not an alteration of the advanced member's contract. Each case must, of course, depend upon its own particular facts. The contract there was in terms much more like the contract in *Williams v. Dominion Permanent Loan Co.*, before cited, than the one in question in this case. But even if the contract here would justify the application of the same principle, the circumstances are entirely

different. It would, to begin with, be a very distinct alteration of the contract to tie up the plaintiff's land for a longer period than eight years. What he must pay, he is to pay within the eight years, and then be free. It may be that during that period, that is during the currency of the mortgage, he is, in his character of member, liable under a properly passed rule, to have his burden as mortgagor increased by increased assessments, but no such rule is in evidence. He simply went on paying according to the contract to the end of the period, and then when he had, as he thought, paid in full and expected his release, was told that he had still several hundreds of dollars more to pay in order to mature his shares. The plaintiff is a locomotive engineer. He had no knowledge or idea of the intricate ways of the ordinary building society methods. He undoubtedly, as the learned Judge finds, thought he was getting a loan for eight years at six per cent. As a matter of fact he was on the terms of the mortgage as it stands, paying, and has paid, between ten and eleven per cent.: if he had paid, or was to be made to pay, what the defendants demanded in addition, the rate would have been increased to something like eighteen per cent. There is in such facts a suggestion of extortion which one would think ought to be made impossible by the Legislature because this is, I am afraid, by no means an isolated case. The two classes, the borrowers and the investors, should, I think, be classified; their respective rights and obligations more clearly declared; and in the case of borrowers on mortgage, the maximum obligation should be declared in plain language in the mortgage itself instead of having to be spelled out of a series of complicated and repeatedly amended rules, as in the present instance.

Fortunately for the present plaintiff, he is entitled to be relieved from further payments by the construction, and for the reasons which I have pointed out, which, in my opinion distinguish this case from the case of *Williams v. Dominion Permanent Loan Co.*, relied on by the learned Judge at the trial.

The appeal should be allowed with costs, and the defendants ordered to execute to the plaintiff a proper reconveyance

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of his land in the mortgage mentioned, and a release of the mortgage; and they must pay the costs of the action.

The defendants should also refund to the plaintiff the admitted overpayment of forty-nine cents on each of the ninety-six payments, or in all \$47.04, for which amount the plaintiff is entitled to judgment, and for which he has already, in effect, a judgment not appealed against, inasmuch as MacMahon, J., in the notes of his judgment, directed that this sum should be allowed to the plaintiff on taking the accounts, although the formal judgment, as drawn up, does not, as I think it should, refer to or contain this declaration.

Moss, C.J.O., concurred.

ARMOUR, C.J.O. was appointed a judge of the Supreme Court of Canada before the delivery of judgment.

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[IN THE COURT OF APPEAL.]

MONRO V. TORONTO R.W. CO.

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March 6.

Partition—Parties—Tenants in Common—Lease—Infant—Repudiation.

The plaintiff, having when he came of age repudiated a lease to the defendants of land of which he and his brother and sister were tenants in common, made when he was an infant, and having made a partition by deed with his brother and sister, to which the defendants were not parties:—

Held, MACLENNAN, J. A., dissenting, that the brother and sister were necessary parties to the plaintiff's action for a partition as against the defendants in respect of their possession under the lease.

Judgment of a Divisional Court, 4 O. L. R. 36, reversed, and judgment of MEREDITH, C.J., *ib.*, restored.

AN appeal by the defendants from the order of a Divisional Court (4 O. L. R. 36) reversing the judgment of Meredith, C.J.C.P., at the trial, and directing judgment to be entered for the plaintiff for partition of the lands in question. The facts appear in the former report and in the judgments printed below.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 11th December, 1902.

James Bicknell, K.C., for the appellants.

Charles Millar, for the plaintiff.

March 6. MOSS, C.J.O.:—The plaintiff has already made partition with his brother and sister, and as against them he needs no order of the Court to perfect his title to the centre parcel, which has been conveyed to him in severalty.

As respects the defendants, his claim to partition rests upon the ground that they and he are tenants in common of the parcel for the remainder of the term of the lease under which the defendants hold.

The plaintiff refused to be bound by the lease, and if, instead of making partition by agreement and conveyance between himself and his brother and sister, to which the defendants were not parties, he had come to the Court for partition, making the defendants parties, he would have had no difficulty in obtaining a partition in severalty, and confining the defendants' lease to the parcels allotted to his brother and

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sister. The position of the defendants would then have been that, in place of being tenants of two undivided shares, they would become the tenants of two divided shares. This is the situation described by Rigby, L.J., in *Mason v. Keays* (1898), 78 L. T. R. 33, where, in speaking of the position of a lessee under the owner of an undivided moiety as a party to a partition action, he said: "Is he as tenant of that undivided moiety a proper party to this action? I think undoubtedly he is. Upon the allegations in the statement of claim his interest would be legally and materially affected by partition. In place of being a tenant of an undivided moiety he would become the tenant of a divided moiety."

But when the plaintiff chose to make partition without reference to the defendants, what is the effect as regards their respective interests?

If the partition was binding upon the defendants, their tenancy under their lease would be restricted to the parcels allotted and conveyed to the plaintiff's brother and sister, and the plaintiff would hold his parcel free from the lease.

Both the Courts below have held the partition not binding on the defendants, and the plaintiff is not now complaining of that holding, but is seeking a partition in specie upon the basis of the defendants having an interest in the parcel allotted to him.

Unless the effect of the language of the lease is to give to the defendants a greater estate than they had before the conveyance by way of partition, they are only entitled to a leasehold interest in an undivided two-thirds of the whole land. And is not this the position in which the plaintiff should be entitled to place them, they having declined to be bound by the partition unless on terms of the plaintiff recognizing the lease as subsisting over his interest? Ought they to be permitted to claim as against him that the partition is binding on him, and that they are entitled to the benefit of the conveyance so far as it conveys to the plaintiff's brother and sister? Or, should they not be held obliged either to accept or reject it as a whole? Should they be permitted to take advantage of it while withholding the benefit of it from the plaintiff? It is manifest that it was not the intention of the

parties to put the plaintiff in the position of being able to hold only one-ninth of the whole land in severalty during the term of the lease.

Unless the defendants can insist on the conveyance, the plaintiff is entitled to a partition of the whole premises, so as to set apart in severalty the two-thirds portion of the whole which the defendants may hold during the remainder of the term of their lease. And in order to accomplish this, his brother and sister should be before the Court.

As I understand the judgments below, Meredith, C.J., and the Divisional Court were of the opinion that the defendants were not entitled to hold the position that the conveyance must be treated as conclusive of the plaintiff's rights.

The chief point of difference was as to whether the partition proceedings should go forward without adding the plaintiff's brother and sister as parties.

In my opinion, they are necessary parties at some stage of the proceedings; and I think that, under the circumstances of this case, they should be made parties before judgment is pronounced. If there had been no conveyance between the co-tenants, and the plaintiff sought partition, the brother and sister would be necessary parties, and in the way in which the case is now to be looked at—and, indeed, in the way in which the Divisional Court regarded it—the proceedings should be allowed to go on as if the plaintiff's rights were unaffected by the conveyance. And any order that may be necessary to put the matter in train for bringing about this result should be made.

On other grounds, also, the plaintiff's brother and sister appear to be necessary parties at some stage of the case.

The effect of a partition or a conveyance is to sever the reversion. The plaintiff's brother and sister, then, have each a reversion in severalty, and each would become entitled to an aliquot part of the rent issuing out of the parcel which he or she holds. And such remedies as they would have against the land under the lease—such, for example, as the right of re-entry for non-payment of rent—would be exerciseable in severalty and not otherwise: R.S.O. 1897, ch. 170, sec. 9.

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The plaintiff's brother and sister are entitled to be present and have a voice in partition proceedings which will fix the parcels out of which they are to receive their portions of the rent, and will relieve another parcel entirely from all claim by them under the lease.

It is certainly most desirable and convenient that they should be parties when these proceedings are taken. The case of *Mason v. Keays, supra*, is not opposed to this view. The question dealt with was, whether the record was so framed as to parties as to enable the Court to pronounce a judgment for sale under the Partition Act, 1868 (Imp.), and the Court of Appeal held that the usual order for inquiries ought to be made. This was in accord with the opinion of Sir George Jessel, M.R., in *Mildmay v. Quicke* (1875), L.R. 20 Eq. 537, that if all parties interested were parties to the cause, a decree for sale could be made at the hearing, but if they were not all parties then the 9th section of the Partition Act, 1868, applied, and a sale could only be ordered "on further consideration." The usual inquiries, made under an order for inquiries under sec. 9, are set forth in Foster on Joint Ownership, at p. 124. Amongst them are, who are the parties interested in the estate, and in what shares and proportions, and for what estate and interests?

In *Baring v. Nash* (1813), 1 V. & B. 551, all that was decided was that a tenant for years of an undivided share of lands could have partition, under the statute of Hen. VIII., against the owners of the other undivided shares, without making the reversioner a party, and that the latter was not compellable to accept the partition as binding on the estate after the expiration of the term. It does not appear whether rent was payable under the lease, and no reference was made to that point. It seems to me not at all similar to the present case, which is one eminently proper to be dealt with by a Judge with all the parties before him, so that when it goes to the Master to make partition it may go with such declarations as may be necessary to enable him to make a proper partition, having regard to all the interests.

The order pronounced by Meredith, C.J., made proper provision for effecting these ends, and I think it should have been accepted by the plaintiff.

The appeal should be allowed, and the judgment of Meredith, C.J., restored.

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The defendants are entitled to the costs of the motion to the Divisional Court, and of the appeal on the final taxation.

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The plaintiff is to have one month within which to add parties and amend in accordance with the judgment of Meredith, C.J.

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OSLER, J.A.:—I think the judgment of the trial Judge was right and should be restored.

GARROW, J.A.:—In the judgment of the Divisional Court delivered by Street, J., there is, I think, an erroneous assumption of fact which seriously affects the conclusion reached, so far as the question of the plaintiff's right to partition is concerned. I refer to the following statement: "At present the plaintiff holds no land in severalty as against the defendants, *for he and they are tenants in common of the whole of it during the remainder of the term.*" After the plaintiff came of age he, in pursuance of the partition proceedings between himself and his brother and sister, conveyed to the one the westerly one-third, and to the other the easterly one-third, and retained for himself the central one-third only, in which the brother and sister released and conveyed to him all their estate and interest, so that he became seised of this central one-third part in severalty as the result of the partition proceedings, and released all his interest in the remaining portions of the demised premises. He could not, therefore, when these proceedings began, have been correctly described as being "tenant in common with the defendants of the whole of it during the remainder of the term," because, on the face of the conveyances constituting the paper title as it existed when this action began, and by which for the present I think all parties are bound, he was merely tenant in common with the defendants in respect of the central one-third part, and of that probably only in the proportion of an undivided two-thirds to the defendants, and the remainder to the plaintiff. If, therefore, the plaintiff is entitled to partition as against the defendants, the division would have to be upon this basis, and not upon the basis of his being entitled,

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as the Divisional Court seems to have held, to an undivided one-third in the whole.

But for the conveyances executed to carry out the partition between his brother and sister and himself, he would, of course, have been entitled to one-third of the whole as against the defendants, and to a partition upon that basis. I think it likely that the parties did not intend the result which seems to follow from the conveyances which they have executed; indeed, the result is, one would think, unjust to the plaintiff. He was not bound by the lease. After he became of age he had a perfect right to repudiate it, and had he not by his own acts complicated the matter the defendants would, in my opinion, have had no defence to his claim for partition and to an allotment to him of one-third of the demised premises in possession, both as against them and the adult lessors.

The defendants were not parties to the partition, and cannot be in any way affected thereby to their prejudice; but may their position not have been actually improved thereby? I do not at present pronounce an opinion one way or the other as to this, but it certainly is not the least of the somewhat puzzling questions which have arisen in the case, that there is language in the lease to defendants upon which to found at least an argument that, as the two adult lessors have now, by the plaintiff's conveyances, become the owners each of a one-third share in severalty, the lease covers the whole of these two several thirds, and also two-thirds of the central one-third, leaving only outstanding and unaffected by the lease an undivided one-third of the central one-third parcel, or one-ninth of the whole.

Considerations such as these have led me to the conclusion that the order made by Sir William Meredith, C.J., at the trial, was the correct disposition to make of the matter. The plaintiff ought to have an opportunity to obtain, if he can, the one-third interest in possession to which he was entitled before the voluntary partition proceedings; but to enable that to be done, or even to be discussed, his brother and sister are, I think, necessary parties, and should be added. The pleadings should be amended as the parties may be advised, within, say,

one month, and the action may be again set down for trial if the parties desire; the trial to proceed in the usual way.

The plaintiff was, I think, wrong to refuse the offer of amendment made at the trial. With his brother and sister, who, I assume, are friendly to him, before the Court, the whole matter could have been speedily disposed of without much additional expense, and he ought to bear the costs which his refusal occasions to the defendants; and as to these costs I agree with the disposition made in the judgment of the Chief Justice.

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MACLAREN, J. A., concurred.

MACLENNAN, J. A.:—This is an appeal by the defendants from a judgment of a Divisional Court (Falconbridge, C. J. K. B., and Street, J.), reported 4 O. L. R. 36, whereby an appeal from a judgment of Meredith, C. J., dismissing the action in default of the plaintiff amending his statement of claim by adding parties, and otherwise, within a limited time, was allowed, and a judgment for the partition of certain land between the plaintiff and defendants was ordered, with a reference as to damages for ouster and waste, and for mesne profits, claimed by the plaintiff.

On the 1st May, 1896, one George Monro was tenant for life, and his three children, Francis John Monro, the plaintiff, Neville Monro, and Amy Monro, were tenants in common in fee in remainder, of the front part of lot No. 1 in the broken front concession of the township of York, on the lake shore, containing about fifteen acres, and also of about eleven acres of land covered with water, lying in front of the other parcel.

On that day these four persons executed a lease to the defendants for a term of ten years, to be computed from the 1st day of April, then past; and in case the tenant for life should survive the 1st day of April, 1906, for a further term for the life of the said George Monro. By the terms of the lease George Monro demised and leased the land for his life interest, and Francis John Monro, Neville Monro, and Amy Monro demised the same for their estate and interest in the lands, and any future estate and interest which they might become entitled to during the currency of the lease, *habendum*

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for and during the term of ten years, to be computed from the 1st day of April, 1896, and should George Monro survive the 1st day of April, 1896, for a further term of the life of the said George Monro.

The rent reserved was \$325 per annum for the first five years, \$500 per annum during the next five years of the term, and also \$500 per annum during the residue of the term, if any, during the life of George Monro, payable quarterly.

The lease is expressed to be made in pursuance of the Short Forms Act, and contains covenants for quiet enjoyment by each lessor, confined to his and her several title in the land. It also contains covenants by the defendants for payment of rent and taxes, and to repair and keep up fences, and not to permit nuisance, and not to cut down or injure shrubs or trees, without consent, except for the purpose of preparing the land for a park and pleasure resort, which exception was not to extend to trees exceeding five inches in diameter, unless for the track of a street railway, or a building to be erected immediately where it—that is, any such tree—stood.

It was also agreed that the defendants might, subject to the foregoing covenants, lay out the land for a park and public resort, laying out, building, and operating therein an extension of their railway, making paths and walks, and erecting pavilions, merry-go-rounds, houses, buildings, etc., which they might think expedient, with the right to remove the same at or before the end of the term.

It was further provided that the alterations and improvements, and plans thereof, should be submitted to George Monro in his lifetime, and, in case of his death within ten years, to his solicitor, for approval, and in case of difference, the same to be decided by arbitration.

The defendants further covenanted to protect the land and trees and shrubs from injury and harm, and not in any way to destroy the natural beauty and character of the land, except as expressly authorized.

It is admitted that at the date of the lease there was a house and outhouses and a barn upon the land; that the barn has been destroyed, that the outhouses have disappeared, and that the house has been moved to another part of the land

The evidence is that at that time the land was worth nothing for farming purposes. There is no evidence of the character or value of the house or outhouses or barn, or that the value of the inheritance was diminished by the removal of the house, or the disappearance of the outhouses and barn.

The lease having been made by tenant for life, and the tenants in common in remainder in fee of two undivided thirds of the land, and being such as above stated, it is evident it was regarded by the lessors as a prudent and beneficial lease at a fair rent, and containing proper covenants and stipulations for the protection of the inheritance.

It was admitted on the face of the lease that the plaintiff was then an infant, and it contains a stipulation that none of the lessors should be liable for any repudiation of the lease by the plaintiff on or after his majority.

The defendants took possession of the land immediately, and laid it out as a public park; laid down rails by means of which their railway cars could enter to set down and take up passengers resorting to the park for amusement and recreation. They also erected various buildings for purposes of amusement and recreation, and thinned out the woods for the same purpose.

George Monro, the tenant for life, died on the 3rd February, 1900, and the plaintiff attained his majority on the 10th August following, and promptly repudiated the lease, and demanded possession of the land. The defendants admitted the plaintiff's right to possession and occupation along with them, or to accept one-third of the rent reserved, which they tendered to him. The latter proposal was rejected.

On the 16th November, 1900, the plaintiff and his brother and sister executed a partition deed whereby the land was divided into three parcels by parallel lines extending from Queen street to the southern limit in Lake Ontario, and whereby the westerly parcel was conveyed in fee to the plaintiff's sister, the eastern parcel to his brother, and the centre parcel, having a frontage of 250 feet on Queen street, to the plaintiff.

This partition deed was not confined to the reversion, in which alone the three parties were tenants in common, but the

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plaintiff thereby conveyed and released to his brother and sister respectively all his right, title, and interest in the easterly and westerly parcels; and they, on the other hand, conveyed and released to him all their respective rights and interests in the central parcel. That, perhaps, was not intended, for the parties had no interest in common in the land except in the reversion. Nevertheless, such is the effect of the deed. Before the deed the plaintiff was tenant in common with the company of the whole land during the term of years, and tenant in common with his brother and sister of the reversion in fee; but after the execution of the deed the plaintiff was tenant in common with the company of the central parcel only, and his brother and sister became tenants in common with the company of the east and west parcels respectively. Such are their present respective rights, unless, as may perhaps be contended, the interest which the brother and sister took under the deed from the plaintiff passed to the company under the words of demise in the lease as "any future estate and interest which they might become entitled to during the currency of the lease."

The plaintiff was, therefore, clearly wrong in claiming, as he did in his action, a partition of the whole of the land, and the judgment, in my opinion, is wrong in decreeing partition of the whole. The appeal must, therefore, be allowed, and the judgment for partition must be confined to the central parcel, in which alone the plaintiff has any interest. It may seem a hardship that the company should be compellable to partition the land in separate parcels and in separate actions, but a tenant in common is not restricted in any way in conveying or settling or subdividing his undivided estate, and the result may be a necessity for several different actions for partition: see *Story v. Johnson* (1835), 1 Y. & C. (Ex.) 538, and (1837), 2 Y. & C. (Ex.) 586, before Chief Baron Lord Abinger—a case a good deal resembling the present in its facts.

It may be that the partition deed did not carry out the intention of the parties, in being made to convey away the plaintiff's undivided interest in the east and west parcels during the residue of the term, and if so, perhaps that undivided interest might be conveyed back to him, in which case the

present judgment would be right; but with that we have nothing to do in this appeal.

The question of damages for alleged waste and ouster and mesne profits is one of considerable difficulty. The plaintiff's rights in these respects are exactly what they would have been if the tenant for life, and the other tenants in common, had done the things which the company has done. By the Statute of Gloucester, 6 Edw. I. ch. 5, tenants for life or for years are impeachable for waste, and liable in damages to the person injured; and by the Statute of Westminster the Second, 13 Edw. I., tenants in common are made liable to their co-tenants for waste. As the matter stands, the plaintiff's claim for waste, if any, probably extends to the whole of the land, for the damage was complete when committed, but the claim for ouster and mesne profits would extend to the whole of the land, only during the short period between the death of the tenant for life and the execution of the deed. For the time subsequent to the deed, it must be restricted to the middle parcel, in which alone the plaintiff has any interest. I cannot say that the disappearance of the outhouses and barn is not some evidence of waste by the defendants, or that the other acts by which the character of the property has been changed, is not some evidence of ouster, sufficient to justify the reference which has been ordered. It may be that when the subject is investigated the damages may be found to be of no great magnitude, but at present we can do no more than say that the reference which has been ordered is not unwarranted.

Appeal allowed with costs.

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CITY OF TORONTO ET AL. V. CONSUMERS' GAS CO. OF TORONTO.

March 3.

Company—Toronto Gas Company—Increase of Capital—Statutory Restrictions—Payments to Directors—Dividends—Reserve Fund—Investment in Business—Plant and Buildings Renewal Fund—Reduction in Price of Gas—Audit by Municipality—Charges for Depreciation or Loss—Construction of Statute.

By 50 Vict. ch. 85 (O.), "An Act to further extend the powers of the Consumers' Gas Company of Toronto," the defendants were given authority to increase their capital stock to \$2,000,000.

By sec. 4 it was provided that the new stock should be sold, and that all surplus realized over the par value of the shares should be added to the reserve fund until it should be equal to one-half of the paid up capital stock, the true intent and meaning being that the defendants might at all times have a reserve fund equal to but not exceeding one-half of the then paid up capital, which fund might be invested in specified securities.

By sec. 6 it was enacted that there should be created and maintained by the defendants a plant and buildings renewal fund, to which should be placed each year five per cent. on the value at which the plant and buildings in use by the defendants stood in their books at the end of their then fiscal year, and that all usual and ordinary repairs and renewals should be charged against this fund.

By sec. 7, any surplus of net profit remaining at the close of any fiscal year, after payment of (1) fees to the directors not exceeding \$9,000 per annum, (2) a dividend at ten per cent. on the paid up capital, (3) the establishment and maintenance of the reserve fund, and (4) providing for the plant and buildings renewal fund, was to be carried to a special surplus account, and whenever the amount of such surplus should be equal to five cents per 1,000 cubic feet on the quantity of gas sold during the preceding year, the price of gas should be reduced for the current year at least five cents per 1,000 cubic feet.

By sec. 8, if in any year the net profits should not be sufficient to meet the requirements of the defendants for the payment of fees, dividends, and provision for the plant and buildings fund (as in sec. 7), the directors were empowered, in their discretion, to draw upon the reserve fund to the extent of such deficiency, and to restore from earnings any amount so drawn, but it was provided that the reserve fund should not otherwise be drawn upon.

By sec. 9, the plaintiffs were authorized to be parties to the annual audit of the defendants' affairs:—

Held, that the defendants were not bound to keep the reserve fund, as an actual separate sum of money, apart from their other property, and invested in the securities mentioned in sec. 4, but were at liberty to use it in their business, as they did from year to year, without objection by the plaintiffs' auditors; and were not bound to carry to the credit of the fund its share of the increase in the value of the defendants' property which it had helped to acquire while invested in the business.

2. That charges for decrease in the value of gas mains, for iron gas lamps which became useless, and for gas meters destroyed, were not charges for renewal or repair, but for depreciation and loss, and did not come within sec. 6 so as to be chargeable to the plant and buildings renewal fund.

3. That under sec. 6 the defendants were entitled to continue to contribute to the plant and buildings renewal fund the five per cent. authorized, even although it should not appear necessary to do so for the purposes for which the fund was to be used.

These sections were construed in *Johnston v. Consumers' Gas Co.* (1895), 27 O.R. 9, upon a special case, but the decision was reversed (23 A.R. 566, [1898] A.C. 447), although not on the question of construction:—

Held, that the Court was not bound by the views expressed in that case.

THIS action was brought by the corporation of the city of Toronto, suing on their own behalf as well as on behalf of all other consumers of gas furnished by the defendants, and by Joseph A. Black, a shareholder of the defendant company, who sued on behalf of himself and all other shareholders of the company, against the Consumers' Gas Company of Toronto, alleging certain breaches by the defendants of their duties under 50 Vict. ch. 85 (O.), and praying that they might be ordered to perform them, and that accounts might be taken of their assets and the manner in which they had dealt with them since the passing of the said Act, and that certain alleged improper dealings of the defendants with their assets, and certain alleged improper entries in their books of account, might be corrected, and that their accounts might be retaken so as to comply with the said Act. Also alleging that, by reason of the breaches of duty aforesaid, and by the defendants' improper method of dealing with their assets and keeping their accounts, the price of gas supplied to the plaintiffs and other consumers had been kept at a higher figure than it should have been in accordance with the said Act, and asking for an account of the sums so overcharged to the plaintiffs and for repayment of them, and for other relief. The defendants denied all charges of improper conduct and breach of duty under the Act. The facts are stated in the judgment.

The action was tried before STREET, J., at the Toronto non-jury sittings, on the 23rd and 24th February, 1903.

E. F. B. Johnston, K.C., and *A. F. Lobb*, for the plaintiffs.

S. H. Blake, K.C., *A. B. Aylesworth*, K.C., and *A. M. Stewart*, for the defendants.

March 3. STREET, J.:—The plaintiffs' counsel at the opening of the case formally withdrew all charges of fraud and wilful violation of the provisions of the Act by the defendants or their officers, and the paragraphs of the statement of claim in which these charges were made were thereupon stricken from the record at their request.

No evidence was offered on behalf of the co-plaintiff Black, and the action as against him was, without objection by the counsel for the city, ordered to be dismissed.

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It was admitted that auditors appointed by the city had made annual audits of the matters contained in the annual statements of the defendants, and had had access to the books and papers of the defendants in accordance with the 9th section of the Act, and that they had made annual reports to the plaintiffs. After giving the evidence of Mr. Neff, an accountant who had examined the annual statements of the defendants since the passing of the Act, and had made certain digests and tables from them, the plaintiffs' counsel asked that the question as to whether the defendants had properly valued their property, plant, buildings, and assets, should be referred to a referee or officer of the Court.

As no charge of fraud was made, and no specific or other overvaluation or undervaluation had been shewn or could be suggested as to the whole or to any particular item, and as it appeared that the valuation approved by the directors had been carried forward from year to year in their books and accounts without any objection by the plaintiffs, I thought no ground was shewn for the reference asked and I refused to direct it. The plaintiffs then closed their case, relying upon the terms of the statute and upon the defendants' own accounts for the relief they claimed. The evidence of the defendants was confined to an explanation of the reasons for certain entries in their books and the circumstances under which they were made, and to a number of tabulated statements from their accounts.

The defendants were incorporated in March, 1848, by the Act 11 Vict. ch. 14 (C.), with a capital of £25,000 currency, and their Act of incorporation recites that it is granted with the consent of the mayor, aldermen, and citizens of Toronto, who had consented to their having the necessary powers for carrying out the objects of the company. By various subsequent Acts previous to 1887 the company were allowed to increase their capital stock from time to time, and their original charter was from time to time amended.

On the 23rd April, 1887, the legislature of Ontario passed the Act 50 Vict. ch. 85, intituled "An Act to further extend the powers of the Consumers' Gas Company of Toronto," under which the plaintiffs claim the rights for the enforcement of which this action is brought. It recites that the company have

petitioned for leave to increase their capital stock, and that it is expedient to grant the prayer of their petition. The first section of the Act gives the company authority to increase their capital stock to a sum not exceeding \$2,000,000. The 4th, 6th, 7th, 8th, and 9th sections are those which are material to be considered in disposing of the questions raised in this action.

The 4th section requires that the new stock to be issued by the company shall be sold by auction in lots of ten shares, after three weeks' public notice in two newspapers in Toronto, and that "all surplus realized over the par value of the shares so sold shall be added to the rest or reserve fund of the company until the same shall be equal to one-half of the paid-up capital stock of the company, the true intent and meaning being that the company may at all times have and maintain a rest or reserve fund equal to but not exceeding one-half of the then paid-up capital of the company, and which rest or reserve fund may be invested in Dominion or Provincial stock, municipal debentures, school debentures, drainage debentures, debentures of loan companies, and mortgages of real estate."

Then the 6th section provides that "there shall be created and maintained by the company another fund, to be called the plant and buildings renewal fund, to which fund shall be placed each year the sum of five per cent. on the value at which the plant and buildings in use by the company stand in the books of the company at the end of the then fiscal year of the company, and all usual and ordinary renewals and repairs shall be charged against this fund."

By sec. 7 it is provided that "any surplus of net profit from any source whatever, including premiums on sales of stock, after the rest or reserve fund shall have been established and maintained as aforesaid, remaining at the close of any fiscal year of the company," after payment of:—

- 1st. Fees to the president, vice-president, and directors of the company, not exceeding in all \$9,000 per annum;
- 2nd. A dividend at the rate of ten per cent. on the paid-up capital;
- 3rd. The establishment and maintenance of the rest or reserve fund;

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4th. The providing for the said plant and buildings renewal fund :—

“shall be carried to a special account to be known as the special surplus account; and whenever the amount of such surplus is equal to five cents per 1,000 cubic feet on the quantity of gas sold during the preceding year, the price of gas shall be reduced for the then current year at least five cents for 1,000 cubic feet to all consumers.”

The 8th section provides that “if in any year the net profits of the company from all sources are not sufficient to meet the requirements of the company for the payment of fees to the president, vice-president, and directors (limited as aforesaid), the payment of dividends at said rate of ten per cent. per annum as aforesaid, and to provide for the plant and buildings renewal fund, it shall and may be lawful for the directors of the company in their discretion to draw upon the said rest or reserve fund to the extent of any such deficiency, and to restore any amount so drawn from time to time from said rest or reserve fund out of the earnings of the company, but the said rest or reserve fund shall not otherwise be drawn upon.”

The construction of these sections of the Act was discussed in the case of *Johnston v. Consumers' Gas Co.* (1895), 27 O.R. 9, and a construction was there placed upon them by my brother Ferguson. That decision was founded upon a special case stated between the parties to the action, and no evidence was therefore taken in it: the effect of the 9th section of the Act, under which the city of Toronto is authorized to be a party to the annual audit of the company's affairs, was not referred to in the judgment, nor was the effect of its annual approval of the manner in which the accounts were kept considered. The decision referred to was reversed in appeal (1896), 23 A. R. 566, and the reversal was confirmed upon further appeal to the Privy Council, [1898] A.C. 447, although the grounds upon which it was so reversed did not render it necessary to deal with the construction of the Act. Under these circumstances, I do not deem myself bound by the views expressed by my brother Ferguson as to the meaning of the sections to which I have referred, although I need not say that I have considered those views with the greatest respect.

The plaintiffs here allege that the defendants have not dealt with their assets and kept the accounts as the Act requires them to do, and that, in consequence, they, in common with the other consumers of gas supplied by the defendants, have failed to obtain the reduction in the price of gas supplied them to which they were entitled.

The specific complaints presented and urged at the trial were these :—

1st. That the defendants were bound under the Act to keep the rest or reserve fund as an actual separate sum of money, apart from the other property of the company, and invested in the securities mentioned in the 4th section of the Act: whereas in fact, although a separate account was kept in their books for the fund, the moneys which the book entries represented had never actually had any separate existence, but had been invested and dealt with by the defendants as a part of their ordinary capital.

2nd. That they had written off and charged certain sums for depreciation in the value of their mains, street lamps, and meters partly to their profit and loss account and partly direct to the reserve fund, instead of to the fund created by the 6th section of the Act, called the plant and buildings renewal fund.

3rd. That it cannot have been intended by the Act that the company should go on year after year adding five per cent. upon their plant and buildings account to their plant and buildings renewal fund, and that they should have ceased carrying this annual amount to the credit of the latter account as soon as it became apparent that it was not needed for the purposes to which that fund was limited.

I propose dealing with these three objections in their order.

1st. With regard to the reserve fund.

Such a fund is a very common feature in well managed and prosperous companies of all kinds, and it consists of moneys made or saved as the result of their operations from year to year and not paid out in dividends to their shareholders. Instead of being left as a floating balance at the credit of the profit and loss account, it is transferred to another account and called the rest account or reserve fund or surplus: but, under whatever name it may exist, it is simply the company's current

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surplus of assets over liabilities, treating the paid-up capital as a liability.

Apart from the provisions of the Act, there was nothing to prevent the defendants from creating such a fund upon their books and dealing with it as they pleased, within their corporate powers, by either keeping it invested in their operations, or dividing it amongst their shareholders. The Act, however, interfered with their full freedom of action by requiring a certain share of their surplus assets to be carried in each year to the plant and buildings renewal fund before anything could be carried to the reserve fund; and by limiting the sum payable in dividends to the shareholders to ten per cent. per annum; and the sum payable in fees to the president and directors to \$9,000 a year. It further conferred upon the defendants a power which perhaps they did not previously possess of investing the reserve fund upon the securities mentioned in the 4th section of the Act. It did not, however, in my opinion, require them to invest it upon these securities, but left it optional with them to do so or not. It did not oblige them to invest it in any particular manner, and so it left them at liberty to deal with it as they had power to deal with it before the Act, that is to say, to retain it in their business as a part of their working capital. It is not necessary for the carrying out of the purposes of the Act that the money should be taken out of their business and kept apart in a bank or in other securities, and it might have been very inconvenient for this to be done. We are not to assume an intention in the Act that the business of the company should be interfered with excepting to the extent necessary for carrying the objects of the Act into effect. It appears from the evidence that at the time of the passing of the Act the defendants had accumulated profits to the amount of \$394,310.27, part of which stood at the credit of a contingent account and the remainder to the credit of "profit and loss account," and this sum was at once carried to the credit of the "reserve fund" and has been added to from time to time. The defendants have never kept separate investments of this money, but have used it in their business subsequent to the Act, as they did before it was passed: and the auditors for the city have year by year

allowed this to be done without objection. It is now claimed that the city is entitled to have the money belonging to the reserve fund treated as trust moneys in the hands of the defendants, and to require them not only to carry to the credit of the fund its share of the profits earned by it in the company's business, but also its share of the alleged increase in the value of the property which it has helped to acquire, such increase to be ascertained by a reference to a Master.

If the reserve fund were a fund from which it would be forever impossible to withdraw moneys once carried to it, there would be some foundation for the view thus put forward; but the 8th section shews clearly that the reserve fund may be increased or diminished according to the annual profits of the company. It may, indeed, be entirely extinguished in case the profits should not be sufficient for a series of years to meet the five per cent. for the plant and buildings renewal fund, and the ten per cent. dividend, for, if these cannot be paid out of profits, the reserve fund may be drawn upon for the deficiency if the directors think proper. The answer to the claim that the company should add to the reserve fund the profits which it has earned in the company's business is therefore very simple: the company have already carried to the reserve fund all their surplus profits, including those earned by the investment of that fund in their business: and if ordered to add them to-day to the reserve fund upon their books, they could withdraw them to-morrow under the 8th section of the Act. The claim to have the alleged increased value of the plant and buildings ascertained by reference, and divided so as to give to the reserve fund its share of the increase in value, is simply an assertion in another form of the charge made in the pleadings, but not supported by a particle of evidence, that the plant and buildings of the company are carried on its books at a figure below their proper value. It is evident, as a matter of bookkeeping that any increase in the sum at which the assets are carried on the books of the company must necessarily go to increasing the apparent surplus assets of the company, or, in other words, the rest or reserve fund, and the plaintiffs would get the benefit of it. But until that sum is shewn to be wrong, it must be assumed to be correct. In my opinion, therefore, the plaintiffs

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are not only in error in their contention that the reserve fund has not been properly maintained, but they have entirely failed in shewing that they have been injured by the manner in which it has in fact been kept.

The second complaint is that certain sums written off the company's assets have been charged to profit and loss or reserve fund instead of to the plant and buildings renewal fund. The sums written off were as follows:—

\$250,000 at various times for depreciation in value of mains.

\$15,000 } Iron gas lamps which became useless and were
\$43,000 } sold as old iron.

\$13,431.38, gas meters destroyed.

Of these, the first two items were charged to the profit and loss account, and the other two to the reserve fund direct.

The charge for depreciation in value of mains was shewn to have been justified by the fact that, owing to the fall in the value of it after its purchase, the iron pipe used in the mains had depreciated by about \$326,000, of which \$250,000 had been written off. I think there is no doubt that the company were justified in writing these sums off the value at which their plant stood on their books, and it was a matter of no moment whether they were charged to profit and loss account or to reserve fund, for the latter could only be increased from the former. The only question is whether the company were bound under the 6th section of the Act to charge them to the plant and buildings renewal fund. The words of that section require them to charge to that fund "all usual and ordinary renewals and repairs." I think it is clear that a charge which is neither for renewal nor repair, but for depreciation and loss, is not a charge coming within this section, and that the plaintiffs' complaint upon this head is therefore without foundation.

The complaint, however, that wrong has been done by the defendants to the city and the consumers of gas by charging this sum of \$321,431.38 to profit and loss instead of to plant and buildings renewal fund, is very fully met and answered in another way. In some years the profits were not sufficient to enable the defendants to carry the full authorized five per cent. to the plant and buildings renewal fund in addition to their

dividend: under these circumstances, the Act entitled them to reduce the reserve fund by a sum sufficient to make up the deficiency. This they have not done, but have only carried to the plant and buildings renewal fund in those years the balance of profit remaining for the year after paying the dividend. The result is, that they have carried to the plant and buildings renewal fund, down to the end of 1899, sums which fall short in the aggregate \$365,923.23 of the sums they were entitled to carry to that fund. So that, even if I were to hold that the amounts written off the profit and loss account for depreciation, which amount in all to \$321,431.38, should have been written off the plant and buildings renewal fund instead, the reserve fund would still be larger by the difference between these two sums, that is to say, by \$44,491.85, than it would have been had the defendants exercised the full rights given to them by the Act.

The third objection is that the defendants are not at liberty to continue to contribute to the plant and buildings renewal fund the five per cent. authorized by the 6th section, because it does not appear to be necessary to do so for the purposes for which the fund is to be used under the statute. I find it impossible to give effect to this objection without entirely disregarding the plain and unambiguous language of the Act, and I must, therefore, dismiss it with the others.

I think it will be seen from a consideration of the terms of the Act and its operation in practice since it was passed, that the really important and effective clauses in it are those which limit the dividend to be declared upon the stock of the company and the fees of the president and directors. These provisions have taken away from the company and their officers all inducement to maintain the price of gas at a rate higher than is sufficient merely to pay the expenses of the company and to maintain their dividend. The efficacy of these provisions in carrying out the purpose for which they were designed is shewn by the fact that, although the reserve fund has never yet reached the figure at which the defendants could be compelled under the Act to reduce the price of gas, they have in fact gradually reduced it from \$1.25 per thousand cubic feet, at which it stood when the Act was passed, to 80c. per

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thousand, at which, according to the evidence, it is being supplied to-day. In other words, the company have, by voluntary reductions in price from time to time to their customers, prevented the reserve fund from being swollen by the profits which a higher price might have brought them, for the plain reason that since the Act no benefit could have accrued to them from continuing to charge the higher prices.

The action, therefore, appears to me to have entirely failed, and it must be dismissed with costs.

T. T. R.

[DIVISIONAL COURT.]

PRING V. WYATT.

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April 11.

Malicious Prosecution—Search Warrant—Summons—Amendment of Information—Belief of Theft—Belief of Ownership—Reasonable and Probable Cause.

In an action for malicious prosecution, in which the plaintiff was nonsuited, it appeared that a magistrate, upon the information of the defendant that the plaintiff unlawfully had and kept in his possession a dog belonging to the defendant, had issued a search warrant to a constable, who took the dog against plaintiff's protest. An information was then laid by the constable to the same effect and a summons issued against plaintiff, on the return of which, on plaintiff's counsel objecting that no offence was shewn, the information was amended, and the plaintiff was charged with stealing the dog, which charge was dismissed:—

Held, that the matter having been fairly stated to the magistrate by defendant he was not liable for the erroneous view of the magistrate as to his jurisdiction in issuing the warrant and summons: but

Held, also, that there being evidence that the defendant had assented to the amendment, he was not justified in charging the plaintiff with theft, because he believed the dog was his own; the real question being, not whether the defendant believed the dog to be his, but whether he believed that the plaintiff had stolen him, and that the case should have been left to the jury. Judgment of the county court of Middlesex reversed.

THIS was an appeal from a judgment of the county court of the county of Middlesex ordering a nonsuit to be entered in an action for malicious prosecution.

The facts appear in the judgment.

The appeal was argued on the 11th of February, 1903, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ.

J. H. Moss, for the appeal. The action is brought for malicious prosecution, trespass and damages in executing a search warrant. The county Judge dismissed it with costs, holding that because the defendant acted in the *bonâ fide* belief that the dog was his, he was not liable. It may be that such a belief is an element in reasonable and probable cause, but the case should have been submitted to the jury, and they should have passed upon the questions of malice and reasonable and probable cause, and particularly upon the question of whether the defendant *bonâ fide* believed plaintiff had intended to steal the dog. The evidence shewed the defendant knew the dog was not stolen, although he authorized that charge to be

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made against the plaintiff, and such course was not reasonable : *Archibald v. McLaren* (1892), 21 S.C.R. 588; *Young v. Nichol* (1885), 9 O.R. 347; *Broad v. Ham* (1839), 5 Bing. N.C. 722; *Huntley v. Simpson* (1857), 27 L.J. Ex. 134; *Turner v. Ambler* (1847), 10 Q. B. 252; *St. Denis v. Shoultz* (1898), 25 A.R. 131.

J. R. Meredith, contra. There is no evidence of malice. The defendant acted *bonâ fide*, and he had reasonable and probable cause. There was no dispute as to the facts, and nothing to be left to the jury. The defendant had to do what he did to get his dog, which the plaintiff refused to give him. The onus of shewing *bonâ fide* belief is on the plaintiff. The fact that the defendant laid the facts before the magistrate, and that the warrant was issued on his advice, protects him, and this notwithstanding the amendment to the information made at the hearing before the magistrate: *Hope v. Evered* (1886), 17 Q.B.D. 338; *Lucy v. Smith* (1852), 8 U.C.R. 518, at p. 520; *Blachford v. Dod* (1831), 2 B. & Ad. 179, at p. 186; *Archibald v. McLaren*, 21 S.C.R. 588, at p. 596, *per* Gwynne, J.

Moss, in reply.

April 11. The judgment of the Court was delivered by STREET, J.:—The facts in this case are practically undisputed.

On 20th February, 1902, the defendant, having with him a collie dog, was passing the plaintiff's house when the plaintiff and his son claimed the dog as theirs, and took possession of it.

The defendant went to a magistrate and stated the facts to him, whereupon the magistrate drew an information stating that the plaintiff did on that day "unlawfully have and keep in his possession and take away a black collie dog . . . the property of the complainant," which was sworn by the defendant, and upon it the magistrate issued a search warrant, and delivered it to a constable, who took the dog out of the plaintiff's possession, the plaintiff insisting that it was his dog.

The constable then laid an information against the plaintiff charging that on the 20th February, 1902, he "unlawfully did have and keep in his possession a black collie dog, the property of William H. Wyatt." A summons was issued by the magistrate upon this information, and both parties, with their counsel and witnesses, appeared before him on 22nd February, 1902.

The plaintiff's counsel objected that the information and summons did not charge the plaintiff with any offence, whereupon there is evidence to shew that at the request of the defendant and his counsel the information was amended by inserting after the words "unlawfully did" the words "steal and take away and."

The trial then proceeded: many witnesses, as well as the accuser and accused, were examined, and at the conclusion the magistrate dismissed the charge, his note being as follows: "Judgment of the Court: the charge of theft against the defendant dismissed, each paying their own costs."

The plaintiff then brought the present action for malicious prosecution.

I agree with the learned Judges before whom the former argument of this case in Divisional Court took place, that upon the evidence adduced at the trial, the defendant having merely stated the facts of the case to the magistrate, and having, as it is admitted, stated them fairly, is not liable in damages for the erroneous view of the magistrate that he had jurisdiction to issue a search warrant, nor for the subsequent action of the magistrate in summoning the plaintiff before him in order, apparently, to dispose of the question as to the property in the dog.

But when the proceedings began before the magistrate, the plaintiff's counsel pointed out that no criminal offence was charged, and that the magistrate had therefore no jurisdiction, there is evidence that the defendant assented to the alteration in the information, which then distinctly charged the plaintiff with the crime of theft, and to the prosecution of the plaintiff upon that charge.

I think the learned Judge in the Court below was in error in coming to the conclusion that as soon as it was established that the defendant believed the dog to be his, he was justified in charging the plaintiff with having stolen it. He thus expresses this view: "There is no dispute that at the time the defendant took the proceedings which he did against the plaintiff, he was acting *bonâ fide* and under the honest belief that the dog, of the possession of which the plaintiff had deprived him, was his property. Assuming that he so believed

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it, and assuming that the dog was the property of the defendant, the plaintiff taking the dog from his possession, and concealing him in the barn, and refusing to give him up to the defendant upon his request, the act of theft was, in my opinion, then and there committed, and if the defendant was honest in his belief as to the ownership of the dog, then he was justified in taking the proceedings which he did against the plaintiff."

The learned Judge had not for the moment present to his mind the principle that a man who takes possession of property in the honest belief that it is his own, is not guilty of theft, even though his belief may be a mistaken one. The real question was not whether the defendant believed that the dog was his, but whether he believed that the plaintiff had stolen him, that is to say, had taken him without any belief that he had a right to take him.

In my opinion, the learned Judge should have left the case to the jury, telling them that if they found that the defendant had authorized the charge of theft, and if he honestly believed, at the time of the proceeding before the magistrate when the information was amended, that the plaintiff had stolen his dog, they should find for the defendant, otherwise they should find for the plaintiff. I do not think the case should have been taken from the jury under the circumstances, upon the ground that reasonable and probable cause for a criminal prosecution had been shewn: *Brown v. Hawkes*, [1891] 2 Q. B. 718; *Munroe v. Abbott* (1876), 39 U.C.R. 78, at p. 83; *Macdonald v. Henwood and Preston* (1882), 32 C. P. 433; *Patterson v. Scott* (1876), 38 U.C.R. 642; *Grimes v. Miller* (1896), 23 A.R. 764.

In my opinion, the appeal should be allowed with costs, the judgment for the defendant should be set aside, and there should be a new trial, with costs of the former trial to the plaintiff in any event.

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[DIVISIONAL COURT.]

REX V. LEWIS.

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April 4.

Criminal Law—Master and Servants Act—Information—Amendment—Trial, without objection—Fine—Commitment—Form of Conviction—Distress.

The defendant was charged before a magistrate with having left his employment before the cost of his transportation to his work, which had been advanced to him, had been repaid by him, contrary to the Master and Servant Act, R.S.O. 1897, ch. 157, as amended by 1 Edw. VII, ch. 19 (O.).

The magistrate issued a warrant, with the facts stated in the information substantially set out, adding these words, "consequently obtaining money under false pretences," and subsequently amended the information by adding "as per section 14 (5a), Master and Servants Act, Ontario Statutes 1901"; but the information as amended was not resworn. The amended information was read over to the defendant, who was informed that he was to be tried under it as amended, to which he made no objection.

The defendant was formally convicted and fined and ordered to be imprisoned in default of payment of the fine and costs.

On a motion to quash the conviction :

Held, that the nature of the offence intended to be charged was sufficiently clear in the original information ; and any doubt was removed by the addition to it of the reference to the Act.

Held, also, that the information having been read over and the trial proceeded with without objection by the defendant, and the magistrate having the defendant before him even if brought there improperly, might try him on the amended information not resworn.

Held, also, that the court being satisfied that an offence of the nature described in the conviction had been committed ; and that the magistrate had jurisdiction ; and that the punishment imposed was not excessive, the conviction was not invalid and could be amended, although the date and place of offence were not stated.

Held, also, that the costs of conveying the accused to gaol being omitted was a matter which could be amended if necessary ; but here, there were no such costs, as the prisoner never went to gaol.

Held, also, that there was special power under the section under which the prisoner was convicted, to award imprisonment in default of payment ; and that by R.S.O. 1897, ch. 90, sec. 4, that power covered costs as well as the fine.

THIS was a motion to make absolute a rule *nisi* to quash a conviction of the defendant, William Lewis, by H. S. Broughton, J.P., on 2nd August, 1902, for that the said William Lewis having entered into an agreement with one Frederick Stoddart to perform work and services for the said Stoddart at the village of Bradford, under which he, the said William Lewis, received from the said Frederick Stoddart, as an advance of wages, the sum of one dollar and thirty cents in a railway ticket for his transportation from Toronto to the village of Bradford, did, without the consent of said Stoddart, leave the

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employ of said Stoddart before the cost of such transportation had been repaid, contrary to the provisions of the Act respecting Master and Servant, R.S.O. 1897, ch. 157, as amended by 1 Edw. VII., ch. 12, sec. 14 (O.).

The grounds upon which the conviction was sought to be quashed were the following :—

1. That the information disclosed no offence.
2. That the defendant was arrested under a warrant charging him with obtaining money under false pretences, and that he was tried and convicted by the justice of that offence without jurisdiction.
3. That the information was not amended before the trial, but, if so amended, it was not re-sworn, and the magistrate had no jurisdiction to hear and determine any question under the Master and Servant Act without an information on oath.
4. That the evidence disclosed no offence.
5. That the prisoner was not permitted to make full defence before the magistrate.

The following objections were also made to the form of the conviction :—

- (1) That it is stated to be for a penalty to be levied by distress, and no provision is made in the body of the conviction for levying distress before imprisonment.
- (2) That the date of the offence is not set out.
- (3) That the costs of conveying the prisoner to gaol are not included.
- (4) That there is no power under the Master and Servant Act to award imprisonment forthwith in default of payment of fine and costs.
- (8) No minute of conviction was made.
- (9) The amended information was not read to the defendant, and he was not aware that he was being tried upon it.

The motion was argued on 9th February, 1903, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ.

S. B. Woods, for the motion. Section 9 of R.S.O. 1897, ch. 157, requires complaints to be made on oath, and the information not having been re-sworn, the justice of the peace had no

jurisdiction: *In re Conklin* (1871), 31 U.C.R. 160; *The Queen v. McNutt* (1896), 3 Ca. C.C. 184; *Dixon v. Wells* (1890), 25 Q.B.D. 249, at p. 257; *Blake v. Beech* (1876), 1 Ex. D. 320, at p. 330. The conviction was for a different offence than the one charged, and the sections of the Criminal Code as to variance have no application: *Martin v. Pridgeon* (1859), 1 E. & E. 778; *The Queen v. Brickhall* (1864), 33 L.J.M.C. 157. The conviction is bad in not shewing that the complaint was made under oath. The defendant did not waive the irregularities by proceeding with the trial, as he was not represented by counsel, and did not know his rights. He could not waive a right he did not know he had: *The Queen v. Cockshott*, [1898] 1 Q. B. 582, at p. 586. The conviction is bad in stating it to be for a penalty to be levied by distress, whereas no distress is mentioned in the body of it, and the heading is part of the conviction. The defendant was actually convicted of obtaining money under false pretences, and the information was amended subsequent to the conviction.

James Bicknell, K.C., for the prosecutor. The reference to the crime of false pretences is surplusage. In any event, the information as amended, was read over to the defendant before the trial, and the trial proceeded without objection or protest on his part. This conduct waived any objection to the information. The evidence disclosed an offence under the Master and Servant Act, R.S.O. 1897, ch. 157, as amended by sec. 14 of 1 Edw. VII., ch. 12, and the Court will amend all technical irregularities: Criminal Code, secs. 845, 846, 847, 889, and 890. In any event, no costs should be given to the appellant: *Rex v. Bennett* (1902), 4 O.L.R. 205; *The Queen v. Cockshott*, [1898] 1 Q.B. at p. 586.

A. E. Scanlon, appeared for the magistrate.

April 4. The judgment of the Court was delivered by STREET, J.:—The affidavits filed upon the motion are in several respects contradictory, but the following appear to me to be the true facts of the case.

The prosecutor Stoddart hired the prisoner and some others in Toronto to come to Bradford to work for him, and as they said they had no money to pay their railway fares to Bradford,

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he bought tickets for them at their request, and handed the tickets to the conductor for them.

After their arrival they worked for him for a few hours, not sufficient to repay him for his outlay, and then refused to do any more work, and left his employ.

He went to the magistrate, Broughton, and swore to an information that "William Lewis did on the 28th of July accept the sum of \$1.30 to pay his fare to Bradford on the condition that said amount was to be worked out, and that the said William Lewis refused to work after reaching this place, with the exception of four hours and thirty minutes."

The magistrate thereupon issued a warrant to arrest the prisoner: in the warrant the facts stated in the information are substantially set forth, but with the addition at the end of the words "consequently obtaining money under false pretences."

The prisoner was arrested and brought before the magistrate on Saturday evening, 2nd August, 1902, at 8.30 p.m.

The magistrate, in the presence of the prosecutor, amended the information by adding at the end the words "as per section 14 (5a) Master and Servants Act, Ontario Statutes, 1901," but the information as amended was not re-sworn.

The amended information was then read over to the prisoner, and he was informed that he was to be tried under it as amended. He made no application for adjournment, nor objection to the trial proceeding.

The prosecutor gave evidence, and then the prisoner was sworn and gave evidence on his own behalf, and the magistrate then adjudged that the prisoner should be fined \$5 and \$4.88 for costs, and that if the amounts be not paid forthwith he should be committed to the common gaol at Barrie for ten days, and a note of this conviction was made by the magistrate at the foot of the proceedings, and a formal conviction was drawn up afterwards.

The prisoner, after remaining in custody for about an hour gave security for payment of the amount, and was released. The conviction so drawn up is as follows:—

"Conviction for a penalty to be levied by distress, etc.

"Canada.

"Province of Ontario,

"County of Simcoe.

"To wit:

"Be it remembered that on the second day of August, in the year A.D. 1902, at Bradford, in the said county, William Lewis is convicted before the undersigned H. S. Broughton, a justice of the peace for the said county, for that the said William Lewis having entered into an agreement with one Fred. Stoddart to perform work and services for the said Stoddart at the village of Bradford, under which he, the said William Lewis, received from the said Stoddart as an advance of wages the sum of \$1.30 in a railway ticket for his transportation from Toronto to the village of Bradford, did without the consent of said Stoddart, leave his employ before the cost of such transportation had been repaid, contrary to the provisions of the Act respecting Master and Servants, R.S.O. 1897, ch. 157, as amended by 1 Edw. VII., ch. 12, sec. 14.

"And I adjudge the said William Lewis for his said offence to forfeit and pay the sum of five dollars to be paid and applied according to law, and also to pay to the said Fred. Stoddart the sum of \$4.88 for his costs in this behalf, and if the said several sums are not paid forthwith, I adjudge the said William Lewis to be imprisoned in the common gaol of the said county at Barrie, in the said county of Simcoe, for the term of ten days unless the said several sums are sooner paid. Given under my hand and seal the day and year first above mentioned at Bradford, in the county aforesaid.

Sgd. H. S. Broughton, (Seal)"
J.P., Co. Simcoe.

I think the nature of the offence intended to be charged against the defendant was sufficiently clear in the original information, and any doubt is removed by the addition to it of the reference to the Act. It is true the information with the amendment was not re-sworn, but it was read over to him, and the trial proceeded without any protest or objection on his part, and he had himself sworn as a witness on his own behalf. Under these circumstances, it seems the magistrate, having th

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defendant before him, even though he may have been brought there improperly, may proceed to try him upon an amended information not re-sworn, even though the Act under which he is tried requires information on oath, provided the defendant does not protest. The present case upon all these points seems fully covered by *Turner v. Her Majesty's Postmaster General* (1864), 5 B. & S. 756, 34 L.J.M.C. 11; 11 L.T. 369; and by *The Queen v. Hughes* (1879), 4 Q.B.D. 614: compare *Dixon v. Wells* (1890), 25 Q.B.D. 249; see also section 896 of the Criminal Code.

Being satisfied, from a perusal of the depositions, that an offence of the nature described in the conviction has been committed by the defendant, and that the magistrate had jurisdiction over it, and that the punishment imposed is not in excess of that by law provided, we should not hold the conviction invalid by reason of the fact that the date and place of the offence not being stated in it, for these clearly appear from the depositions, and we have power under sections 883 and 889 of the Criminal Code to amend the conviction by stating the offence to have been committed at Bradford on 29th July, 1902. The evidence shews that the defendant admitted, in effect, to the prosecutor that he had not worked out the amount he had received.

As to the other objections, I do not think we can hold that the defendant was not allowed to make his defence.

The objection that the conviction is headed "conviction for a penalty to be levied by distress" is of no weight. The form used was so headed, but the body of it is correctly drawn under the statute, and the heading forms no part of the conviction.

That the costs of conveying the accused to gaol are not included is a matter which might have been amended if necessary; but, as a matter of fact, there are no such costs, for the prisoner never went to gaol. There is special power in the section under which the prisoner was convicted to award imprisonment in default of payment, and by ch. 90 R.S.O., sec. 4, this power covers costs as well as fine.

In my opinion, therefore, the motion to make the rule *nisi* absolute should be dismissed with costs.

G. A. B.

[IN CHAMBERS.]

SMITH V. McDEARMOTT.

1903

Judgment—Action for Equitable Execution—Right to attack Judgment—Absence of Fraud and Collusion—Discovery.

April 9.

In an action brought by a judgment creditor against the judgment debtors and one L. for the recovery, by way of equitable execution of moneys claimed to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances under which the judgment was recovered, cannot, in the absence of fraud and collusion in the recovery thereof, be insisted upon.

A motion that one of the plaintiffs, who, on examination for discovery, had refused to answer questions relating to such circumstances should be compelled to attend and be examined at his own expense, was therefore refused.

THIS was an application by the defendant Lee to compel one J. C. Smith, the husband of the plaintiff herein, to attend at his own expense and submit to be examined and answer all questions relating to the account of the dealings between the plaintiffs and the defendants, McDearmott, Evans & Co., and to the settlement referred to in the examination of the plaintiff, and to produce the book or books of account containing the account of the dealings between the plaintiffs and the defendants other than the defendant Lee.

The facts appear in the judgment.

The motion was heard before Mr. Winchester, the Master in Chambers, on the 28th day of March, 1903.

W. D. Gwynne, for the defendant Lee.

W. N. Ferguson, for the plaintiffs.

April 9. THE MASTER IN CHAMBERS:—The action is brought by the plaintiffs, as judgment creditors of the defendants, McDearmott, Evans & Co., for equitable execution against a certain sum of \$771.91 alleged to belong to the judgment debtors, and transferred to the defendant H. H. Lee to defeat, hinder and defraud the creditors of said judgment debtors.

The defendant H. H. Lee denies all fraud, and also denies the allegations contained in the statement of claim, other than

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the granting of an injunction order in this action. The judgment upon which this action is brought is thus placed in issue. The plaintiff's husband, J. C. Smith, was by consent examined for discovery. During his examination he was asked to tell about the transactions out of which the indebtedness, represented by the judgment, arose, when he refused to give the information on the ground that there was no plea of fraud or collusion in recovering the judgment, and that the judgment could only be attacked for fraud or collusion. In consequence of this refusal the present application was made.

A number of cases were referred to on the argument, and subsequently that of *Allan v. McTavish* (1881), 28 Gr. 539, and (1883), 8 A.R. 440, was cited by counsel for the defendant.

That action was similar to the present one, being brought under the statute of Elizabeth, to set aside a conveyance as fraudulent as against a judgment creditor. It was held by the late Chancellor Spragge that though ordinarily the production of the exemplification of a judgment at law is admissible, and has been generally received as evidence of a debt due the plaintiff against all parties in suits under the statute of Elizabeth, yet that the judgment so recovered by the plaintiff against the debtor was not evidence against his sons, being *res inter alios judicata*: see pp. 545-6-7.

It appears that in that case the plaintiff rested his case in the first place upon the judgment, and upon what was therein disclosed as the cause of action, namely, a covenant dated on or about the 24th November, 1856, by Dugald McTavish (the debtor) to pay to John Arnold or his assigns £50 5s. 0d., with interest, by instalments, the last of which was payable in 1860. The Chancellor in his judgment, referring to the facts disclosed in the case and to the judgment sued on, said, at p. 546: " . . . The case stands thus: a conveyance is made in 1872 " (by the debtor to his sons) " for which a valuable consideration was to be paid, not the full value of the land, but still a substantial consideration in money and in equivalents for money. Some six years afterwards a judgment is recovered against the grantor by a stranger, upon an alleged covenant, and in an action to which the grantee is no party. How can it be reasonably taken as adjudged against him, that the alleged

covenant was entered into by his grantor? . . . In practice certainly the exemplification of judgment has been produced, I think ordinarily, as proof against all parties, or at least as admissible evidence against all parties of the debt due to the plaintiff, and has been received generally in suits under the statute of Elizabeth, and I was inclined, at the hearing of this cause to think that it was admissible evidence. But the question being pointedly raised by Mr. Osler, I have examined it, and have come to the conclusion that it is not admissible."

In the Court of Appeal (1882), 8 A. R. 440, Chief Justice Sir George Burton, then Mr. Justice Burton, at p. 442, said: "We need not, I think, be under any apprehension, as was suggested upon the argument, that in affirming the rule laid down by the learned Chief Justice of this Court" (formerly Chancellor Spragge) "as to the effect of a judgment as regards third persons not parties or privies to the proceedings in which it was pronounced, we are unsettling the law or establishing any new principle of decision. The misconception arises from confounding the right to impeach a judgment with its effect in evidence. It is of course conclusive on third persons equally as upon the defendant in the proceedings to establish the relationship of debtor and creditor, the amount of the debt, and the date of its recovery. Neither can a third party be heard to allege any defect or illegality which might have been urged by the debtor as a defence in the original suit, as, for instance, as was suggested upon the argument, that notes sued on were void for want of stamps. But whilst the judgment is conclusive and unimpeachable, and furnishes conclusive evidence of such a suit having been brought, the recovery in it and the date of its recovery, it furnishes no evidence whatever as regard third persons of any of the allegations in it on which the recovery proceeded. These facts, if material to the plaintiff's case, have to be established by appropriate evidence."

In that case it was necessary, in order to enable the plaintiff to succeed in his action, to shew the indebtedness of the judgment debtor at a time long anterior to the recovery of the judgment, and this he attempted to do by putting in the judgment as evidence of that fact, and it was held that the judgment furnished no evidence of the allegations in it on

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which the recovery proceeded, but that the judgment was conclusive and unimpeachable, and furnished conclusive evidence of a suit having been brought, the recovery in it, and the date of its recovery as against strangers.

In the present case that is all that is sought by the plaintiff as against all the defendants, namely, evidence of such a suit having been brought, the recovery in it, and the date of its recovery. Without attacking this judgment, the defendant is not in a position to inquire into the facts on which the recovery proceeded. Following the judgment of Chief Justice Sir George Burton, I hold that the witness, J. C. Smith, was within his rights in refusing to answer the questions asked, and that the motion must be refused, with costs to the plaintiff in the cause.

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[MACMAHON, J.]

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April 14.

Statute of Limitations — Simple contract debt — Conversion into specialty debt — Evidence of.

Default having been made in the payment of two promissory notes payable to a bank, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed, after reciting the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, the father thereby conveyed the same to the trustee as security, in the first place for his indebtedness, and then for that of the bank, power being given to the trustee to sell the lands on one month's default in payment and on notice in writing by the trustee of his intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay same. In 1893 written notice having been given by the trustee of his intention to sell, a deed of release of all his interest in the lands was given by the defendant to the bank, the deed reciting that it was made to save expense of a sale:—*Held*, that neither the trust deed, nor the deed of release converted the debt into a specialty debt, and the defendant could validly set up the statute of limitations as a bar to an action brought in 1902.

THIS was an action tried before MACMAHON, J., without a jury, at Toronto, in March, 1903.

The action was upon two promissory notes, dated respectively the 6th and 27th March, 1884, both at three months, made by the defendant, Frederick R. Lingham, in favour of the plaintiffs for \$35,000 and \$25,000 respectively; and also upon a deed, dated the 7th June, 1884, made by the defendant, whereby he acknowledged that he owed the plaintiff \$58,875.52.

The defendant set up as defences the statute of limitations, and accord and satisfaction.

A trust deed, dated 7th June, 1884, was put in evidence by the plaintiffs to which the parties were the defendant's father, the defendant himself, one Richardson, an agent of the plaintiffs' bank, as trustee, and the plaintiffs.

It recited that the defendant was indebted to his father, Job Lingham, in the sum of \$10,000, and to the plaintiffs in the sum of \$58,875.52 or thereabouts, and that the father owned and held certain lands, known as the Itasca lands, as security for the \$10,000 which the father thereby conveyed to the trustee as security in the first place for the sum of \$10,000 due him, and then as security to the plaintiffs for the \$58,875.52, with power

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to the trustee to sell the lands after one month's default in payment of the amount secured by the said deed, and notice in writing of the intention to exercise the power of sale. The deed contained an acknowledgment by the defendant of his indebtedness, and the giving security in the lands therefor, but there was no covenant by him to pay the same.

On the 3rd February, 1893, the bank served a written notice on the defendant demanding the sum of \$124,044.10, which it was claimed was then due by the defendant to the bank, and that unless the amount was paid within one month the bank would proceed to sell the lands.

On the 24th July, 1893, a deed was executed by the defendant, whereby, after reciting the trust deed of 7th June, 1884, and the power of sale contained therein, and that, in order to avoid the expense of a sale, the defendant had agreed to execute a release, the defendant, in consideration of the premises and of \$1.00, thereby released to the bank all his interest in the said lands.

The defendant was also instrumental in procuring releases to the bank from his mother, and brothers and sisters of their respective interests, if any, in the lands.

One of the sisters, Mrs. Denison, was at first unwilling to execute a release, but upon the defendant referring her to her brothers William and Louis to corroborate his statement that he had paid off his indebtedness to his father, and that his father at the time of his death had no interest in the lands.

W. Cassels, K.C., and *A. W. Anglin*, for the plaintiffs.

C. H. Ritchie, K.C., and *Northrup*, K.C., for the defendant.

The learned Judge reserved his decision, and subsequently delivered the following judgment.

April 14. MACMAHON, J. [after setting out the facts as above]:—As appears by the recital in the trust deed, Job Lingham held the Itasca lands as security for the \$10,000 owing him by his son, the defendant, which remained a first charge under the trusts in the deed.

The defendant alleged that the \$10,000 note which his father had indorsed, and for which the latter held security on

the Itasca lands, had been paid by him. And this statement seems to have been accepted as true by all the other heirs of Job Lingham, for they released all their interest in the lands to the bank. If that note was not paid by the defendant, then he and all the other heirs of Job Lingham would, upon a sale of the lands, have been entitled to share in the \$10,000.

Mr. Clouston, the general manager of the bank, stated positively that there was never any agreement between himself and the defendant in the nature of an accord and satisfaction, as sworn to by the latter. The defendant's acts in 1893 shew, I think, that he did not at that time consider there was any agreement between the bank and himself which would form an accord and satisfaction.

Job Lingham was not the actual owner of the lands when he conveyed them in trust to Richardson to secure the debt due by the defendant to the bank. As already pointed out, the recital in the deed states that he owns and holds the lands for the debt due to him by Frederick R. Lingham, the defendant. And there is then an acknowledgment by the defendant of the amount of his indebtedness to the bank, and the giving of security on the lands for the indebtedness so acknowledged to be due. There is no covenant to pay: and, as said in *Marryat v. Marryat* (1860), 28 Beav. 224, at p. 227: "The deed was executed not for the purpose of creating any covenant from Marryat, but for the purpose of giving a security for the simple contract debt, which he admits to be due. It is to be observed that though you may infer the promise to pay from the recital, the promise to pay simply raises a mere assumpsit, unless the object of the deed is confined to that acknowledgment, but if the object of the deed is other than that, and merely collateral to it, then the recital amounts to nothing."

In *Isaacson v. Harwood* (1868), L.R. 3 Ch. 225, a defaulting trustee under a will executed a deed under seal, whereby, after reciting that he held in his hands trust moneys to a certain amount which he proposed to secure by a mortgage on his own estate, he conveyed certain property to the *cestui que trust* by way of mortgage. The deed contained a *proviso* for redemption and a power of sale, but no covenant to pay the mortgage debt or interest. The mortgaged estate was insufficient to

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cover the debt. It was held that the deed did not convert the debt into a specialty debt.

Lord Cairns in giving judgment, said, at p. 228: "In the simple case of a debtor acknowledging a debt by a deed under seal, without any other object declared by the deed, no doubt it must be assumed that, although no words of covenant are used, the debtor meant to be bound, or else why should he go through the form of executing a deed? But is the present a case of a party acknowledging a debt by deed under seal, with no other object but to acknowledge the debt? It is plain that he had another object. There was a clear antecedent liability in Harwood, arising out of his breach of trust. There was, therefore, no necessity for any acknowledgment, and if the desire of the parties was to fix on him a specialty obligation, they would have used unambiguous words for that purpose. I cannot doubt that the sole object of the deed was to give security for the debt, and all the recitals appear to me, not to be by way of covenant for payment of the debt, but a simple narrative leading up to the security, and to the form in which the security should be given. In addition to this, there is a conspicuous absence of an express covenant to pay the mortgage debt." See also *Jackson v. North-Eastern R.W. Co.* (1877), 7 Ch. D. 573, 585.

The case in hand comes within the principle laid down in the above decisions, and it must be held that the acknowledgment by the defendant by the recital in the trust deed of the debt due to the bank did not convert it into a specialty debt.

Then the debt being barred by the statute on the 8th June, 1890, did the assignment by the defendant to the bank in July, 1893, of his interest in the lands revive the debt? If the \$10,000 note was paid by the defendant, then Job Lingham at the time of his death had no interest in the Itasca lands. That would be the proper finding, for this reason: Mrs. Denison refused to release her interest in the lands for some months after the deed was executed by her mother and brothers and sisters, and it was not until after the defendant had referred Mrs. Denison to her brothers William and Louis, as being able to corroborate his statement that the \$10,000 note had been paid by him, and therefore that the father had no interest in

the lands, that Mrs. Denison executed the deed. If Job Lingham had no interest in the lands, then the bank could sell free from this claim.

But, even assuming that the defendant had not paid the \$10,000 note, and that the release to the bank in June, 1893, of his interest in the lands—which would necessarily include his interest as one of the heirs of Job Lingham in the \$10,000—and the subsequent sale in August, 1896, of timber valued at \$5,500 from the lands, his share of which the bank credited on its claim against him, was merely permitting the bank to realize an additional sum from the same security which it held for the defendant's debt.

The only object the bank had in procuring the releases from the defendant, and his only intention in granting a release of his interest was, as stated in the recital to the release, "in order to avoid the expense of a sale." There was nothing in the defendant's act in executing the release from which an intention could be implied to pay the debt, and so waive the statutory bar.

There will, therefore, be judgment for the defendant, dismissing the action with costs.

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THE CANADIAN BANK OF COMMERCE V. TENNANT.

March 30.

Writ of summons—Renewal of—Grounds for—Sufficiency of.

Where an *ex parte* order for the renewal of a writ of summons on the ground of inability to discover the defendant's place of residence was obtained, a motion to set aside such order was refused, although it was shewn that the defendant had never changed his place of residence, and that it could readily have been ascertained from the directory, the local Master who made the *ex parte* order, having been satisfied as to the efforts made to effect such service and nothing having been withheld from him.

Howland v. Dominion Bank (1892) 15 P.R. 56, and *Mair v. Cameron* (1899) 18 P.R. 484 distinguished.

THIS was a motion by the defendant to set aside an *ex parte* order for the renewal of a writ of summons, the renewed writ, and the service thereof.

The facts appear in the judgment.

The motion was argued in Chambers on the 26th day of March, 1903.

J. H. Tennant, for the defendant.

D. L. McCarthy, for the plaintiffs.

MARCH 30. THE MASTER IN CHAMBERS:—This action is brought for the recovery of two promissory notes, of which the defendant is the maker, one of which is dated the 12th day of June, 1895, for \$800, payable four months after its date, and the other is dated the 23rd of August, 1895, for \$210, payable in four months after date thereof, and interest on both sums.

The plaintiffs issued their writ of summons herein on the 11th of October, 1901, being four days prior to the note for \$800 becoming outlawed.

This writ not having been served, the plaintiffs applied to the local Master at Sarnia for and obtained an order renewing same, on the 10th of October, 1902, on an affidavit made by a clerk in the office of the plaintiffs' solicitors, in which he stated:—

"2. That inquiries have been made to ascertain the whereabouts of the above-named defendant, but that so far such inquiries have been without success.

"3. That at the time of making the notes sued on herein, the said defendant resided in the city of Toronto, in the county of York, in the Province of Ontario, but that the plaintiffs have been unable to locate the said defendant."

The writ so renewed was served on the defendant in the city of Toronto on the 7th day of March, 1903. The defendant applies to set aside the *ex parte* order renewing the writ, and such renewed writ and the service thereof, on the ground that such order should not have been made under the circumstances, namely, that the defendant could have been readily served in Toronto at any time after the issue of the original writ, and that the Statute of Limitations would have applied to the plaintiffs' claim had not the writ been renewed.

In support of his application the defendant filed an affidavit in which he states that he has resided in Toronto continuously since the notes sued on herein were made, and setting forth his house address, as also his office address, which appeared in the city directory for 1901 and 1902, and that from the 11th day of October, 1901, to the 10th day of October, 1902, he could have been found in Toronto either at his office or residence.

In answer to the motion, the plaintiffs filed an affidavit of their manager at Sarnia, and a clerk formerly employed by the solicitors of the plaintiffs. These affidavits shew that, after instructions for suit had been given, inquiries were made to locate the defendant, and that the payees of the notes in question informed them that the defendant had left Toronto and was residing in Buffalo, but that although further inquiries were made they were unable to ascertain his whereabouts until February of this year.

Other affidavits are filed by the defendant and the plaintiffs' manager, not only as to a visit by the manager to the defendant in 1896, but also as to the merits of the action.

The cases of *Howland v. Dominion Bank* (1892), 15 P.R. 56, and *Mair v. Cameron* (1899), 18 P.R. 484, were relied upon by defendant's counsel as entitling him to the order asked for.

In the former case it was held that the *ex parte* orders

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renewing the writ of summons were properly set aside on the ground that there had been no good reason shewn for making same. Even then the Judges of the Court of Appeal were doubtful whether they should have set them aside had they been applied to in the first instance. In the *Mair v. Cameron* case the orders were set aside on the ground that the plaintiff's solicitor, while adducing evidence sufficient to warrant the local Judge in making the order for renewal, withheld evidence he could have obtained from his own client which would have shewn that the plaintiff well knew where the defendant could have been served.

While there can be no doubt whatever as to the residence of the defendant being in Toronto during the period after the issue of the writ, and that he could have been readily served at any time within the year after its issue, and that the Court regards with jealousy applications for extending the time for service, especially where, but for the existence of the writ, the ordinary period of limitation would have expired, I am of opinion that the plaintiffs not having withheld any evidence from the local Master in applying for the *ex parte* order, and having explained their efforts in ascertaining the whereabouts of the defendant to his satisfaction, I should not set aside his order.

The defendant had good reason to make this application. In refusing it, I do so by making the costs, costs in the cause.

On 27th April, 1903, BRITTON, J., affirmed the Master's order and dismissed an appeal therefrom with costs.

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[DIVISIONAL COURT].

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March 12.

Intoxicating Liquors—The Liquor Act, 1902—Referendum—Power of Legislature—Trial of Offenders—Constitution of Court—County Judge—Special Court—Issue of Summons—Adjournment for Sentence—R.S.O., 1897, ch. 9, sec. 191.

On a motion to quash a conviction for attempting to put a paper other than the ballot paper authorized by law into a ballot box while the question referred to the electors by the 2nd section of the Liquor Act, 1902, was being voted upon throughout the Province, contrary to the provisions of section 191 of the Ontario Election Act, R.S.O. 1897, c. 9, and section 91 of the Liquor Act, 1902:—

Held, that the reference by the Legislature of such a question, as that mentioned in section 2 of the Liquor Act, 1902, to the vote of the electors, instead of deciding it themselves, although unusual, was well within their powers.

Held, also, that the intention of the Legislature, under sub-section 4 of section 91, was to create a tribunal with authority to try certain specified offences, and that the court so created had power under the words "to conduct the trial" to bring the party charged before the court, try him for the offence and sentence him, if found guilty; and that the county judge appointed to conduct the trial does not act as a county judge, but as a court specially created; and who should act out of his own county in holding the actual trial; and that he may issue his summons in his own county or elsewhere; and has power after finding the accused guilty to adjourn the court to a subsequent day for the purpose of passing sentence.

MOTION to quash a conviction.

The following facts are taken from the judgment of STREET, J.:—

On Friday, the 6th February, 1903, a rule *nisi* was granted by a Divisional Court upon the application of the defendant, and upon reading the papers returned under a writ of certiorari and the affidavit of John A. Robinson ordering Archibald Bell, Esq., purporting to act under section 91 of the Liquor Act, and D. J. Donahue, clerk of the peace for the county of Elgin, to shew cause why the conviction of the defendant by the said Archibald Bell; for that he did on the 4th December, 1902, at the city of St. Thomas attempt to put a paper other than the ballot paper authorized by law into the ballot box, should not be quashed upon the grounds therein set forth, the material portions of which are referred to below.

The proceedings which are here sought to be quashed were taken under the 4th sub-section of section 91 of the Liquor Act, 1902.

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The question referred to the electors by the 2nd section of the Act was voted upon throughout the Province on the 4th December, 1902.*

The county crown attorney of the county of Elgin notified the President of the High Court of Justice for Ontario at Toronto that he had reason to believe that the defendant had committed or attempted to commit the offence of placing or attempting to place unauthorized ballots in the ballot box used in polling subdivision No. 4 for the city of St. Thomas.

Thereupon the President of the High Court of Justice designated His Honour Judge Bell, county Judge of the county of Kent, to conduct the trial of the persons accused.

Judge Bell thereupon issued a summons calling on the defendant to appear before him on 29th December, 1902, at the court house in St. Thomas to answer the charge that he did fraudulently attempt to put into the ballot box used at the said polling subdivision No. 4 a paper other than the ballot paper authorized by law to be put in, contrary to the provisions of section 191 of the Ontario Election Act and section 91 of the Liquor Act, 1902.

The defendant did not appear in person at the time and place named, but counsel appeared for him and applied for an adjournment; the trial, as appears by the conviction, was continued on that day and on the 19th and 20th of January, 1903, and on the 3rd of February, 1903; and the Judge, having heard witnesses in support of the charge, as well as for the defence, found the defendant guilty and sentenced him to be imprisoned for one year in the common gaol of the county of Elgin.

The motion was argued on the 12th of February, 1903, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET, and BRITTON, JJ.

J. A. Robinson, for the motion. The referendum or taking the votes of the electors provided for in 2 Edw. VII. ch. 33 (O.) is illegal, as there is no power in the Legislature to take the opinion of the voters: *Davies v. The City of Toronto* (1887), 15 O.R. 33 at p. 39. It is derogating from the prerogative of the

*The question submitted to the electors was: "Are you in favor of bringing into force the Liquor Act, 1902."

Crown to give power to the people to nullify any legislation. An amendment of the constitution would be necessary to do this: *Fielding v. Thomas* (1896), Wheeler's Confederation Law of Canada, 1079. There was no judicial authority in the county judge to try the offences and award punishment; more extensive words are required than those used in sub-sec. 4 of sec. 91, 2 Edw. VII. ch. 33 (O.) viz., "*to conduct the trial of the persons accused.*" Under these words he might not be more than a prosecutor. He should have been appointed under the seal of the Dominion or the Province. In the absence of special provision there should have been a trial by jury: Paley on Convictions, 7th ed., pp. 3, 7, and 9. A county judge has jurisdiction only in his own county: *In re County Courts of British Columbia* (1892), 21 S.C.R. 446. The summons should not be issued in one county returnable in another. The place of trial is a matter of jurisdiction, and it was "procedure" only that was incorporated by sec. 91 of the Liquor Act of 1902. The Judge adjudicated on the case on one day and passed sentence on another; there is no power to divide the judgment: *The King v. Dimpsey* (1787) 2 T.R. 96 at p. 97; *The King v. Harris* (1797), 7 T.R. 238; and the charge should be formally laid before him before he issued his summons, and the sentence should not have been passed in the absence of the accused: *The Queen v. Williams* (1870), 18 W.R. 806. The offence was not a crime, so attempting to do it is not a crime. The words "he is authorized," contained in the summons, are used in sub-sec. (c) of sec. 191 R.S.O. 1897, ch. 9, and would apply only to the deputy returning officer; the words used in the conviction were "authorized by law to be put in," which extend the offence: *Martin v. Ford* (1793), 5 T.R. 101; *Bennett v. Edwards* (1827), 7 B. & C. 586; *Jenkinson v. Thomas* (1792), 4 T.R. 665. The Judge should only deal with offences for which money penalties are prescribed: sec. 91, sub-sec. 2; here the punishment is imprisonment. A new statute and criminal law must be strictly construed: *Rumball v. Schmidt* (1882), 8 Q.B.D. 603.

John Cartwright, K.C., Deputy Attorney-General, and *D. J. Donahue*, K.C., contra. The Legislature has unlimited power within its area: *The Liquidators of the Maritime Bank of*

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Canada v. The Receiver General of New Brunswick, [1892] A.C. 437, at p. 442. In this case the statute is only to become law by proclamation, but even that limitation is not necessary in order to render the enactment valid. The summons may be issued anywhere under sec. 188 R.S.O. 1897, ch. 9, and no information is necessary. The county Judge is to preside at the trial, and having the procedure under sub-sec. 4 of sec. 91 2 Edw. VII. ch. 33 (O.) has a Court. See also Murray's Dictionary, tit. "Conduct."

March 12. FALCONBRIDGE, C.J.:—Objection 10 in the order *nisi* is that the statute providing for the voting under the Liquor Act was unconstitutional and void.

We practically disposed of this point at the argument and it is sufficient now to say that while the apparent derogation of powers of the Crown and of the Legislature and delegation of those powers to a popular vote may be startling propositions to the student of constitutional history, yet they seem to be within the legislative authority of the Provincial Parliament. As to the plenary authority of a Provincial Legislature within its prescribed limit of subject and area, see *Hodge v. The Queen* (1883), 9 App. Cas. 117; *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, [1892] A.C. 437 at p. 442.

The preliminaries prescribed by the Liquor Act, 1902, ch. 33, sec. 91 (4) (O.), seem to have been complied with.

The county crown attorney notified the President of the High Court (of Justice) that he was informed or had reason to believe that corrupt practices or illegal acts had been committed in his county in connection with the voting, and the President designated the Judge of a county other than that in which the offence was committed "to conduct the trial" of the persons accused.

The serious point of the case is in the words "to conduct the trial." Does this phrase convey the power to try (*i.e.*, summarily) to convict and to award a punishment?

"I do perceive here a divided duty," viz., to give a strict construction to words in favour of life or of the subject's

liberty, and also if possible to carry out the manifest will of the Legislature.

Not without much doubt and hesitation I arrive at the conclusion that the reference in the section to the procedure under section 188 suffices to confer on the designated Judge these powers for which apt words have not been otherwise used.

There is nothing in the other objections which were taken.

The motion must be dismissed, under the circumstances, without costs.

STREET, J.:—Objection was taken in the rule *nisi* to the proceedings upon several grounds.

It was objected rather than argued that the whole Liquor Act, 1902, was unconstitutional, because the Legislature had referred the question mentioned in sec. 2 to the vote of the electors instead of deciding it themselves.

I am unable to see any force in this objection: the proceeding is not usual certainly, but it seems well within the power of the Legislature: and they reserve to themselves the power to deal with the question after the vote is taken.

The main objection, and certainly the most serious one, is that which goes to the root of the whole proceeding, and sets up that the Legislature has not properly constituted any court or given to any person the necessary authority to try and convict and sentence persons for infractions of "The Liquor Act, 1902."

The only section under which it can be contended that any court or person has been constituted or authorized to deal with offences under the Act is the 4th sub-sec. of sec. 91 of the Liquor Act, 1902, which is as follows:—

"(4.) In case a county or district crown attorney is informed or has reason to believe that any corrupt practice or other illegal act has been committed in his county or district in connection with the voting under this part, he shall forthwith notify the President of the High Court at Toronto, who shall designate a Judge of a county or district court of a county or district other than that in which said offence was committed, to conduct the trial of the persons accused, and the procedure thereon shall be the same as nearly as may be as on

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the trial of illegal acts under section 188 of the Ontario Election Act and amendments thereto."

This language certainly falls far short of what one would expect to find in a section intended to create a new tribunal for dealing with an offence created by the statute of which it forms part. There is, however, no doubt that the Legislature did intend to declare that persons committing certain specified acts should be liable to certain prescribed punishments, and did intend by this sub-section to create a tribunal with authority to try them.

"The President of the High Court at Toronto" may, without difficulty, be taken to mean "the President of the High Court of Justice for Ontario," and he is authorized to "designate a Judge of a county or district court . . . to conduct the trial of the persons accused: and the procedure thereon shall be the same as nearly as may be, as on the trial of illegal acts under sec. 188 of the Ontario Election Act and amendments thereto."

If we are to read the words "to conduct the trial" in their strict literal sense and as meaning merely that the Judge designated is to preside upon the hearing of the evidence for and against the person charged, the result is to make the clause useless, because no other provision is made for bringing the person charged before the court for trial, or for sentencing him afterwards.

Having in view the plain general intention of the Legislature, I think it our duty to struggle to give to the language of the section a construction which will best carry that intention into effect.

I think we may gather that the intention was to create a court consisting of the Judge, designated for each case by the President of the High Court of Justice, for the trial of the person charged: and to give to the court so created, under the general power "to conduct the trial," the power to bring the person charged before the court, to try him for the offence, and to sentence him if found guilty, for all these powers are conferred upon the Judges in sec. 188 of the Ontario Election Act, which is incorporated by reference in sub-sec. 4 of sec. 91 of the Liquor Act, 1902. I think this construction of sub-sec.

4 is justifiable as being a necessary implication from its expressed intention, and is, therefore, no violation of the rule that statutes creating special jurisdictions are to be strictly construed.

Another objection was that His Honour Judge Bell, being the Judge of the county court of the county of Kent, could not act out of his own county, and that he could not issue his summons in Kent and try the defendant in Elgin.

The answer to this is that he was not acting as a county Judge at all in the matter, but as a court specially created by the Act, and that the Act intends the county Judge who is designated to act out of his own county in holding the actual trial: there seems no reason why he should not issue his summons in his own county or elsewhere. Nor does there seem any reason why, having found the defendant guilty on 20th January, 1903, he should not adjourn the court until 3rd February, 1903, as he did, for the purpose of sentencing him, as he did, upon that day.

The charge in the summons is in the words of sub-sec. (c) of sec. 191 of the Ontario Election Act, and is, I think, unobjectionable in point of form.

The motion to quash must, therefore, be dismissed. No costs.

BRITTON, J.:—William Walsh was convicted by Judge Bell of the offence of fraudulently attempting to put into the ballot box used at polling subdivision 4 in the city of St. Thomas, at the vote on the referendum, on the 4th December last, a paper other than the ballot paper authorized by law to be put in.

Attempting to do such a thing is an offence under sec. 191 of the Ontario Election Act, and this sec. 191 is one of the sections made part of the Liquor Act, 1902.

It was argued that sec. 191 can apply only to a returning officer or deputy returning officer, because under sec. 58 of the Liquor Act, 1902, only the deputy returning officer has control of the ballot box, and he alone is authorized to receive a ballot from the voter and put it in the box. After that the box is delivered to the returning officer. It is said that this sec. 191 is aimed against "stuffing the ballot box" by an officer

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having charge of it. The section is wide enough to meet the case of an offending returning officer or deputy returning officer, but it is not limited to these officers. The words of the section are "no person shall," etc., etc., "no person shall attempt," etc.

It follows that any person who does, etc., or who attempts to do so is guilty.

As there was evidence on which Judge Bell could act, if he had jurisdiction, there can be no review of his finding.

The main objection upon which the matter was ably argued by Mr. Robinson was that Judge Bell had no jurisdiction to try for the offence. This involves the consideration of sec. 91 of the Liquor Act, 1902.

The fundamental principle of interpretation is that the intention of the Legislature is "to be accepted and carried into effect." A statute is to be expounded "according to the intent of them that made it." See Maxwell's Interpretation of Statutes, 3rd ed., pages 1, 2.

The Legislature of Ontario had power to constitute a court. The offences to be dealt with are those against an Ontario statute.

There can be no doubt that the Legislature intended by sub-sec. 4 of sec. 91 of the Liquor Act, 1902, that, upon the designation of "a Judge of a county . . . to conduct the trial of the persons accused," such Judge should be a court with all necessary power to try the persons accused of offences mentioned in that section, and to punish such persons according to law if they are found guilty.

The procedure on the trial conducted by that Judge "shall be the same as nearly as may be as on the trial of illegal acts under sec. 188 of the Ontario Election Act and amendments thereto."

Section 187 of the Ontario Election Act is as follows: "Any two of the Judges appointed for the trial of election petitions shall be and constitute a court for the trial of all corrupt practices and other illegal acts committed during an election, being offences in respect of which this Province has legislative authority."

Section 91 of the Liquor Act, 1902, constitutes the designated county Judge a court for the trial of offences under that Act.

Section 188 of the Ontario Election Act establishes the procedure for trial before the constituted election court of offences under that Act.

Section 91 of the Liquor Act, 1902, adopts that procedure "as nearly as may be" on the trial before the court constituted for the trial of offences under the Liquor Act.

Either the words used in sub-sec. 4, sec. 91, are absolutely without meaning, or they are sufficient to constitute a court.

If the procedure is not wholly covered by what is expressly stated, anything lacking in mere procedure must be implied. "Where an Act confers a jurisdiction, it impliedly grants, also, the power of doing all such acts, or employing such means, as are essentially necessary to its execution: Maxwell, 3rd ed., p. 500.

The objection to the want of territorial jurisdiction, where the designated county Judge acted, is not well taken.

The alleged offence was committed, if at all, in the county of Elgin; therefore, under the statute, the Judge designated must be a Judge of some other county than Elgin. And such designated Judge, if he could act at all, could, under sec. 188 of the Ontario Election Act, have the summons issued or returnable at any place in the Province.

This is very sweeping, but such is the Act.

In this case the accused was not inconvenienced, nor in any case is any accused person likely to be inconvenienced by being summoned to any remote place.

The other objections to the conviction must be overruled. The cases cited by counsel for defendant have little or no bearing, as the proceedings are under the particular statutes now considered.

I agree that the motion should be dismissed without costs.

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[DIVISIONAL COURT.]

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March 21.

SHUTTLEWORTH V. MCGILLIVRAY.

Husband and Wife—Gift from Husband to Wife—Possession—Execution Creditor—Married Woman's Property Act.—R.S.O., 1897, ch. 163, sec. 3.

The defendant purchased certain pictures between 1895 and 1898, and bringing them home handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother, and all were hung up in the house occupied by her and her husband. An execution creditor of the defendant caused the sheriff to levy on them:—

Held, that since the Married Woman's Property Act, 1884, (R.S.O., 1897, ch. 163, sec. 3,) a married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband; and that here the subsequent possession of the pictures was the wife's, although the house was occupied by her husband and herself:—

Held, also, that the effect of sub-sec. 4 of sec. 5 of R.S.O., 1897, ch. 163, enacting that a woman married since 1889 may hold her property free from the debts or control of her husband, 'but this sub-sec. shall not extend to any property received by a married woman from her husband during coverture,' is not to make property received by the wife from the husband during marriage liable to the husband's debts.

APPEAL by the claimant in an interpleader case in the 1st division court of the county of Middlesex.

The plaintiff was an execution creditor of the defendant, and had seized under execution three pictures which were claimed by the defendant's wife. It appeared that between the years 1895 and 1898 the defendant had purchased with his own money the pictures in question, and bringing them home had handed them to his wife, the claimant, telling her that he gave them to her. One of the pictures was afterwards framed by the claimant in a frame which had been given to her by her mother. The three pictures were then hung up in the house occupied by the defendant and the claimant, and remained there until they were seized under the plaintiff's execution. These facts were not disputed. The learned Judge decided that the pictures still remained the property of the defendant upon the authority of *In re Breton's Estate*, *Breton v. Woollven* (1884), 17 Ch. D. 416, and *Schaffer v. Dumble* (1884), 5 O.R. 716, and he gave judgment in favour of the execution creditor.

The claimant appealed to the Divisional Court, and the appeal was argued on January 14th, 1903, before STREET and BRITTON, JJ.

John R. Meredith, for the claimant, contended that since the Married Woman's Property Act, 1884, 47 Vict. ch. 19 (O.), a gift of the kind here in question from husband to wife may be made, and can only be attacked by creditors on the ground of intent to defeat and defraud them: *Kent v. Kent* (1891-2), 20 O.R. 445, 19 A.R. 352; that delivery was not necessary to complete such a gift: *Kilpin v. Ratley*, [1892] 1 Q.B. 582; *Ramsay v. Margrett*, [1894] 2 Q.B. 18.

J. H. Moss, for the execution creditor, contended that the gift was not complete until delivery of possession, and that as the husband and wife were living together in the husband's house, the property here continued to be in the possession of the husband; and that the claimant could not argue that the possession being ambiguous, must be attracted to her property, and that it was her property, because the possession was attracted to it: R.S.O. 1897, ch. 163, secs. 3, 5, sub-sec. 4; *Schaffer v. Dumble*, 5 O.R. 716, citing *O'Doherty v. Ontario Bank* (1882), 32 C.P. 285; *Sherratt v. Merchants Bank of Canada* (1894), 21 A.R. 473.

Meredith, in reply. It was sufficient that the husband gave the pictures with the intention of giving them, and the wife received them with the intention of receiving them.

March 21. STREET, J. [after stating the facts as above]:—
In the present case there was an actual present gift and delivery by the husband to the wife sufficient to have constituted a complete gift, and to pass the property as between two persons not standing in the relation of husband and wife to one another.

At the time the cases relied on by the learned Judge below were decided, a wife could not take a direct gift from her husband: it was necessary that a trustee should intervene, unless the husband constituted himself a trustee for her by express declaration to that effect, and it was under this state of the law that those cases were decided.

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Under the law, however, as it has stood here since 1884, "A married woman shall be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee:" R.S.O. 1897, ch. 163, sec. 3 (1).

This provision appears to do away with her former disability to receive and hold personal as well as real property by direct gift or transfer from her husband. The pictures in question became her property by her husband's act. The subsequent possession was hers, although the house was occupied by her husband and herself: *Ramsay v. Margrett*, [1894] 2 Q.B. 18; *Kilpin v. Ratley*, [1892] 1 Q.B. 582.

It was argued that sub-sec. 4 of sec. 5 of the Married Woman's Property Act, R.S.O. 1897, ch. 163, has the effect of making liable to the husband's debts all property received by the wife from him during coverture. I think, however, that the true construction to be placed upon that sub-section when read along with sub-sec. (1) of sec. 3, above set forth, is to place the wife precisely in the position of a *feme sole* with regard to property transferred to her by her husband during coverture; and that, therefore, she can hold the property against his creditors unless the transfer is made for the purpose of defeating them. Here there is no evidence whatever of such a purpose.

The appeal must, therefore, be allowed with costs, and the judgment entered for the execution creditor should be set aside, and judgment entered for the claimant with costs.

BRITTON, J.:—Upon the evidence it seems clear that there was a completed gift of the pictures in question by the defendant to his wife, the claimant.

The law as laid down in *Sherratt v. The Merchants Bank of Canada*, 21 A.R. 473, is in the claimant's favour, unless sub-sec. 4 of sec. 5 of R.S.O. 1897, ch. 163, limits the application of sec. 3 of that Act, and prevents a married woman from holding, as against her husband's creditors, a chattel given to her by her husband when he was not insolvent, and where the gift could

not be said to have been made to defeat or delay or defraud creditors.

This sub-sec. 4 of sec. 5 of R.S.O. ch. 163, was not in force, and so not material, in the decision of *Sherratt v. The Merchants Bank of Canada*, 21 A.R. 473, but it was to some extent discussed there, and Mr. Justice Maclellan was of opinion that the clause in question, even if available in that case, would not have the effect of excluding the claimant from the benefit of the Act. It is also referred to in *O'Doherty v. Ontario Bank*, 32 C.P. 285.

I am of opinion that now, in every case where before the Married Woman's Property Act a gift by the husband to a trustee for the wife would be good as against creditors, it is good if to the wife direct.

I agree that the appeal should be allowed, and that claimant is entitled to judgment.

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[DIVISIONAL COURT.]

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March 21.

MATTHEWS & CO. v. MARSH.

*Bills of exchange—Accommodation maker—Renewal note obtained, by fraud—
Right to sue on original note—Division Court—Power to amend—Division
Court Rule 4.*

The defendant joined in a promissory note, as the payees knew, for the accommodation of his co-maker. When it became due, the latter tendered a renewal note, purporting to be signed by the defendant, which the payees accepted and gave up the original note stamped "paid." The primary debtor became insolvent and died, and the payees afterwards sued the defendant on the renewal note only in a Division Court, when the defendant swore he never signed it, but, nevertheless, there was verdict and judgment for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the judge, at the trial, allowed the plaintiffs to claim in the alternative upon the original note, as well as on the renewal, and to amend his claim accordingly. A verdict was then returned for the plaintiff on the original note:—

Held, that the Division Court judge had jurisdiction under Rule 4 of the Division Courts, to amend the plaintiffs' claim as he had done:—

Held, also, that the renewal note being a forgery, so far as the defendant's signature was concerned, and the plaintiffs, therefore, having been induced by the fraud of the primary debtor to give him up the original note, the plaintiffs retained a right to recover in equity on the latter:—

Held, also, that a witness was entitled to refer to entries in the books of the primary debtor, made by him or under his direction, to refresh his memory.

APPEAL to the Divisional Court by the defendant from a judgment of the 3rd division court of Muskoka in favour of the plaintiffs upon a promissory note for \$130 and interest, dated April 4th, 1899, made by the defendant and one McDonald in favour of the plaintiffs, payable two months after date.

It appeared that the defendant had made the note for the accommodation of McDonald, in favour of the plaintiffs, who knew that the defendant was a surety only. When it came due McDonald desired to renew it, and a renewal note was given him by the plaintiffs to be signed, and he returned it to the plaintiffs in due course, with signatures to it purporting to be those of himself and the defendant. Thereupon the plaintiffs gave up to McDonald the original note stamped "paid:" the renewal note is dated June 6th, 1899, and is for \$132.60 with interest, and is in other respects similar to the original.

McDonald died insolvent on July 19th, 1900. The plaintiffs tried to get the amount of the note from his estate but failed,

and then brought the present action against Marsh upon the note of June 6th, 1899.

The action was tried on January 15th, 1902, before His Honour Judge Mahaffy and a jury, and a verdict was given for the plaintiffs for the note and interest, \$153, although defendant swore he never signed it. A new trial was granted upon the defendant's application, and the action was tried before a jury again, and resulted in a verdict for the defendant. A new trial was again granted on the plaintiffs' application, and the case came down a third time, on May 14th, 1902, for trial before a jury. The learned Judge allowed the plaintiffs to claim in the alternative upon the note of June 6th, 1899, on which the action was brought, or upon the original note of April 4th, 1899, and the claim was amended accordingly. No objection was taken to the charge of the learned Judge, and a verdict was returned by the jury in favour of the plaintiffs upon the original note. The defendant again applied for a new trial, and this being refused he appealed to the Divisional Court upon the following, amongst other, grounds:—

1. That the learned Judge had no jurisdiction to allow the plaintiffs to amend their claim or to claim upon one note as an alternative to the other.

2. That the books of the deceased McDonald were improperly admitted as evidence.

3. That the learned Judge should have nonsuited the plaintiff upon the ground that he had given time to McDonald, and dealt with the security to the plaintiff's detriment.

The appeal was argued on January 14th, 1903, before STREET and BRITTON, JJ.

R. D. Gunn, K.C., for the defendant, contended that the Judge had no jurisdiction to make the amendment: *Bank of Ottawa v. McLaughlin* (1883), 8 A.R. 543; *Bicknell & Seager's Division Court Act*, 2nd ed., p. 109; and that when the first note was given up by the holder, his right was gone; and it was then a cancelled document.

C. E. Hewson, K.C., for the plaintiff, as to the jurisdiction of the division court Judge, referred to *Peterkin v. McFarlane* (1884), 9 A.R. 429; and *Bicknell & Seager's Division Court*

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Act, 2nd ed., p. 155; and as to the plaintiff's right to recover, to *McIntyre v. McGregor* (1900), 21 C.L.T. 25, and *Irwin v. Freeman* (1867), 13 Gr. 465. He also cited *Eades v. McGregor* (1859), 8 C.P. 260.

Gunn, in reply, contended that the plaintiff had been guilty of such laches as debarred him from succeeding: *Canadian Bank of Commerce v. Green* (1880), 45 U.C.R. 81; Bills of Exchange Act, 53 Vict. ch. 33, sec. 62 (D.); and that he could not sue on one note, and also for a like amount on another note: Division Courts Act, sec. 72, sub-sec. 3; *Pryor v. The City Offices Company* (1883), 10 Q.B.D. 504; *Building and Loan Association v. Heimrod* (1883), 19 C.L.J. 254; *Sherwood v. Cline* (1888), 17 O.R. 30. He also referred to Bicknell & Seager's Division Court Act, pp. 64, 317-8.

March 21. STREET, J. [after stating the facts as above]:—The plaintiff's claim was within the jurisdiction of the division court, and the fact that he claimed it as alternative to another claim which was also within the jurisdiction, did not take it beyond the jurisdiction. There was also undoubted right in the Judge below to amend the plaintiff's claim under Rule 4 of the division courts.

I see no ground for interfering, upon the facts before us, with the verdict of the jury, or with the action of the Judge in submitting the case to the jury. The defendant was admittedly liable originally to the plaintiffs upon the note of April 4th, 1899. If the plaintiffs were induced by the fraud of McDonald to give him up that note in exchange for another upon which the defendant's signature was forged, the cases shew that the plaintiffs' remedy upon the original note remains in equity, even though it may have been cancelled and given up: *Irwin v. Freeman*, 13 Gr. 465; *McIntyre v. McGregor*, 21 C.L.T. 25.

The jury might well come to the conclusion that this fraud had been committed by McDonald on the plaintiffs, and that the plaintiffs were therefore entitled to recover upon the original note. We are not told exactly the terms of the charge of the learned Judge to the jury, but as no objection was taken to it by the counsel for the defendant, we may assume that the case was fairly left to them.

I think that the witness McConachie was entitled to look at his entries, or those made under his direction, in McDonald's books to refresh his memory, and that the entries in the books to which he referred were properly before the Court.

The decision of the Divisional Court in *McIntyre v. McGregor*, above referred to, requires us to hold that the renewal of the original note without the defendant's consent is no answer to a claim against the defendant upon the original note where the renewal was obtained by fraud.

The appeal must, therefore, be dismissed; but as the learned Judge below has, we think, been very liberal to the plaintiff in his allowance of costs, we make no order as to the costs of the present appeal.

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BRITTON, J.:—(1) The claim in the division court, as amended, comes strictly within R. S. O. 1897, ch. 60, sec. 72, sub-sec. (d).

(2) I agree that the learned district court Judge had power to amend.

(3) No objection was made to the Judge's charge, and there is evidence to warrant the finding of the jury.

(4) It cannot be successfully urged that a renewal obtained by fraud or forgery is such a settlement of the claim, or is giving time so as to bar plaintiff's recovery upon original note.

As the plaintiff succeeded only upon the amended claim, and failed as to the note upon which action was originally brought, and in reference to which former trials were had, and as in the result below the defendant has been saddled with large costs, the appeal should be dismissed without costs.

A. H. F. L.

[DIVISIONAL COURT.]

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Nov. 27.

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Feb. 3.

March 28.

NOLAN

v.

THE OCEAN, ACCIDENT AND GUARANTEE CORPORATION,
LIMITED.

Insurance—Life insurance—Condition in policy—Arbitration before action.

In an action on a policy, on which was endorsed a condition, that in case any question should arise "it is a condition of this policy, which the assured by the acceptance thereof agrees to abide by, . . . every such difference shall be referred to the arbitration and decision of a mutual person, . . . and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable, . . . and it is hereby expressly stipulated and declared, that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim under this policy," etc. "Provided also, that compliance with the stipulations endorsed hereon is a condition precedent to the right to recover on this policy:—"

Held, that an action did not lie on the policy nor did the amount payable under it become due, until the determination of the arbitrator, to be appointed under the agreement to refer, contained in the condition.

Held, also, that the condition was not in contravention of section 80 of The Ontario Insurance Act, R.S.O. 1897, ch. 203.

Spurrier v. LaCloche [1902] A.C. 446, followed.

THIS was an appeal by the plaintiff from a judgment of Meredith, J., reversing an order of the Master in Chambers, refusing to stay proceedings in the action under the circumstances set out in his judgment, where the facts are fully stated.

The motion was argued in Chambers on the 14th November, 1902, before Mr. Winchester, the Master in Chambers.

H. Cassels, K.C., for the motion.

S. Alfred Jones, contra.

November 27. THE MASTER IN CHAMBERS:—This is an action brought by the beneficiary named in a policy of insurance issued by the defendant corporation on the life of the late Dennis Nolan for \$1,000, the loss in event of death being payable to his mother, the plaintiff herein.

It appears that the policy was issued on or about the 11th day of August, 1901, insuring the assured for one year from

the 30th July, 1901. The accident from which, it is alleged, the assured subsequently died, took place on the 15th March, 1902. He died on the 8th June, 1902.

The policy provides as follows: "It is witnessed that if the assured shall, during the period above mentioned, sustain any bodily injury by accident from an outward, external and visible means or cause happening to the assured, and if the assured shall die solely from the effects of such accident, and independently of other causes, within ninety days after the happening thereof, the corporation shall pay to Mary Nolan, mother, or to the legal representatives or assigns of the assured, the sum of one thousand dollars after proof satisfactory to the directors of the corporation for the time being of the cause of the death of the assured shall have been given."

The defendant corporation, denying all liability and refusing to recognize in any way the claim of the plaintiff herein under the said policy, or acknowledge in any way the right of the plaintiff to make any demand upon them, and through their solicitors before action brought, in addition to the above statements, stated: "If Mary Nolan takes action, every defence that is open to the company will be made;" and in a subsequent letter, written before the writ of summons was issued, the solicitors of the corporation wrote to the plaintiff's solicitors as follows: "We have now heard from our clients in reference to the question of accepting service of a writ on their behalf. We are not authorized to do so. Our clients point out that if Mrs. Nolan has any claim against them, which they deny, they are entitled to have the matter dealt with by arbitration, and they will object to suit being brought if a writ is issued."

On the 6th October, 1902, the plaintiff issued her writ of summons herein, which was duly served upon the defendant corporation, who, after appearing thereto, apply for an order staying all proceedings herein forever "on the ground that the plaintiff is not entitled to maintain this action, inasmuch as there has been no award under condition No 15 of the conditions of assurance incorporated in the contract upon which the action is brought, and that the provisions of said condition No. 15 have not been complied with."

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In support of the application the affidavit of the general manager of the defendant corporation is read, in which he states:

"4. The defendants have in no way waived their rights under the condition of assurance numbered 15, indorsed upon the policy sued on, and claim the right to have the matters in difference between the plaintiff and the defendants referred to arbitration as by said clause provided.

"5. The defendants were at the time when this action was commenced, and still remain, ready and willing to do all things necessary to the proper conduct of the arbitration.

"6. The only claim, if any, that the plaintiff in this action can make against the defendants is under and by virtue of the defendants' contract with Dennis Nolan, deceased, of which contract the said exhibit "B" is, I believe, a true copy."

The condition numbered 15 referred to in the above affidavit reads as follows:—

"15. Upon any difference arising between the corporation and the assured or any claimant under this policy, as to the meaning or extent of the contract thereby made, the amount of any claim thereunder, or the fulfilment of the conditions thereof, or any question, matter or thing concerning or arising out of this assurance; it is a condition of this policy which the assured, by acceptance thereof, agrees to abide by, notwithstanding any law to the contrary; that every such difference shall be referred to the arbitration and decision of a neutral person; each party to pay his or their own costs of the reference and a moiety of the costs of the award; and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable in respect of the said claim; and this condition shall be deemed and taken to be an agreement to refer as aforesaid, and if the accident shall happen to the assured while proceeding to or while in Europe, then under the provisions of the English Arbitration Act, 1889, except so far as is hereby provided as to costs and otherwise. And it is hereby expressly stipulated and declared, that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim, under this policy in respect of which any

such difference may have arisen, and to the enforcement of any such claim."

The above condition was made a part of the policy by the following proviso contained in the policy, viz.: "Provided, also, that compliance with the stipulations indorsed hereon is a condition precedent to the right to recover on this policy, and that the proposal and declaration of the assured form the basis and are part of this contract, which is to be deemed to be executed by both parties at the head offices, in Montreal, of the corporation."

The application for the stay is made under R.S.O. 1897, ch. 62, sec. 6, which provides as follows:—

"6. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

For the defendants the cases of *Guerin v. The Manchester Fire Assurance Co.* (1898), 29 S. C. R. 139, and *McInnes v. Western Assurance Co.* (1870), 5 P. R. 242, (1871), 30 U. C. R. 580, were cited. These actions were on policies of insurance against fire, and it was held that under the conditions no action was maintainable until an award fixing the amount of the claim in the first case, and the loss or damage in the second case, had been made.

For the plaintiff it is contended, that there is no submission signed by both parties, as required by R.S.O. 1897, ch. 62, secs. 2, 6. With reference to this objection, I would refer to *Baker v. Yorkshire Fire and Life Assurance Co.* (1892), 1 Q. B. 144.

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It is further contended by the plaintiff that the condition in question ousts the jurisdiction of the Court, and therefore is void as contrary to public policy, and citing in support of this contention *Caledonian R. W. Co. v. Greenock & Wemyss Bay R. W. Co.* (1874), L.R. 2 H.L. Sc. 347; *Dawson v. Lord Otho Fitzgerald* (1876), 1 Ex. D. 257; and *Collins v. Locke* (1879), 4 App. Cas. 674.

The leading case on the question is *Scott v. Avery* (1856), 5 H.L.C. 811, where Lord Chancellor Cranworth illustrates the distinction between a covenant preventing an action being brought until an award has been made, and one which attempts to oust the jurisdiction and prevent any action being brought. At p. 848 he says: "If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A.B. that if I do, or omit to do a certain act, then I will pay to him such a sum as J.S. shall award as the amount of damage sustained by him, then, until J.S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen." See also the judgments of Lord Justice Brett and Kelly, C.B., in *Edwards v. The Aberayron Mutual Ship Insurance Society* (1876), 1 Q.B.D. 563, at pp. 586, and 597.

At p. 596 Lord Justice Brett says: "The true limitation of *Scott v. Avery*, 5 H.L.C. 811, seems to me to be that which was expressed in it, and which, as I have pointed out, has so often been expressed about it, that if parties to a contract agree to a stipulation in it, which imposes, as a condition precedent to the maintenance of a suit or action for a breach of it, the settling by arbitration the amount of damage, or the time of paying it, or any matters of that kind, which do not go to the root of the action, *i.e.*, which do not prevent any action at all from being maintained, such stipulation prevents any action being maintained until the particular facts have been settled

by arbitration; but a stipulation in a contract, which in terms would submit every dispute arising on the contract to arbitration, and so prevent the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained; it gives at most a right of action for not submitting to arbitration, and for damages, probably nominal. And the rule is founded on public policy."

These cases have also been followed in the United States Courts: *Reed v. Washington Fire and Marine Insurance Co.* (1885), 138 Mass. 572, at p. 575, and cases cited; *Badenfield v. Massachusetts Mutual Accident Association* (1891), 154 Mass. 77, at p. 82; *Whitney v. National Masonic Accident Association* (1893), 52 Minn. 378.

In delivering the judgment of the Court in the last case, Judge Dickinson said at p. 385: "It has long been the settled rule of law that if, in a contract creating a definite legal obligation, (e.g., to pay a certain sum of money on a specified contingency,) there is embodied an agreement that the rights or obligations of the parties shall be determined by arbitration, and that no action shall be maintained on the contract, such an agreement is not legally effectual to bar such an action: *Gasser v. Sun Fire Office*, 42 Minn. 315, 317, (44 N.W. Rep. 252;) *Edwards v. Aberayron Mut. S. Ins. Soc.*, 1 Q.B. Div. 563, 578, *et seq.*, and cases cited; . . . In *Scott v. Avery*, 5 H.L.C. 811, and particularly in the opinion of Lord Campbell, is language which seems to be opposed to the rule as it had theretofore been established. But it is apparent from the later case of *Edwards v. Aberayron Mut. S. Ins. Soc.*, *supra*, that the majority of the court in the exchequer chamber did not regard that case as overruling former decisions. The rule is so well settled, and so generally recognized, that it is needless to consider the various reasons which have been assigned for it."

In my opinion the above decisions apply to the facts of this case, and I, therefore, hold that the plaintiff is entitled to proceed with this action, notwithstanding condition 15 indorsed on the policy of insurance herein. The motion will, therefore, be refused, with costs in the cause to the plaintiff.

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From this judgment the defendants appealed to a Judge in Chambers, and the appeal was argued on 23rd January, 1903, before MEREDITH, J.

H. Cassels, K.C., for the appeal.

S. Alfred Jones, contra.

February 3. MEREDITH, J.:—The rule applicable to this case is well settled: the difficulty is in applying it.

The jurisdiction of the Court cannot be ousted as to a cause of action which has arisen: but where no cause of action has arisen there is no jurisdiction.

In the circumstances of this case, if liability to pay has arisen, no words of the parties, or of either of them, can prevent the Court giving relief; but if no liability to pay arises until after award, the action is premature.

Less is gained by seeking to follow the reasoning of any one Judge against that of any other, expressed in the case of *Scott v. Avery*, 5 H.L.C. 811, or in any other case, than by looking at what was actually decided in the case, and for the results which, according to binding authority, flow from the decision in *Scott v. Avery*.

Upon the face of the policy, the contract to pay is made subject to the conditions indorsed upon it, as conditions precedent; and, in the fifteenth of such conditions, it is provided that the obtaining of an award, as therein provided, shall be a condition precedent to liability to pay any claim under the policy, and to the enforcement of it. In other words, the liability is upon the award and policy, not upon the latter alone.

These words of the Lord Chancellor, used in giving judgment in the House of Lords in the case of *The Caledonian Insurance Co. v. Gilmour*, [1893] A.C. 85, are pertinent:—

“The question is not whether, where a contract creates an obligation to pay a sum of money it is a good answer to an action to recover it that disputes have arisen as to the liability to pay the sum, and that the contract provides for the reference of such differences to arbitration, but whether where the only obligation created is to pay a sum ascertained in a particular

manner, where, in other words, such ascertainment is made a condition precedent to the obligation to pay, the Courts can enforce an obligation without reference to such ascertainment? If they could do so they would not be enforcing the contract made by the parties, but one of a different nature."

And the case of *Spurrier v. La Cloche*. [1902] A.C. 446, to which the Master was not referred, is quite in point in the applicant's favour, and is a decision of our ultimate tribunal.

The claim in each of these cases happened to be one for indemnity—upon a fire insurance policy—but that is immaterial, the principle applies whatever the nature of the action; the Court cannot enforce an immature claim.

Under the Arbitration Act, R.S.O. 1897, ch. 62, the Court has power to further the plaintiff's claim effectually, if the defendants fail, or unduly delay, to comply with the terms of the contract; but it has no power to compel payment before reference and award, contrary to the contract, upon which the obligation to pay does not arise until after reference and award.

The application is not one made to the discretion of the Court under the sixth section of the Arbitration Act, but is one based upon a denial of any right of action in the plaintiff.

The logical result is that the action being premature, ought to be dismissed, but that is not asked; and can better be done, and all questions of costs better dealt with, after the award, having regard, among other things, to the condition requiring legal proceedings to be commenced within one year.

There is no question of fact in dispute: the one question is that which has been considered—a question of law plainly arising upon the policy; and neither party desiring to go to trial to have it there considered, it may as well, therefore, be determined upon this summary motion.

There is nothing in the point that the plaintiff is not one of the contracting parties; she is suing upon the policy, and if she can recover at all, it must be upon the contract contained in it.

Appeal allowed; and proceedings stayed, and costs reserved until after award, but with liberty to apply meanwhile if necessary.

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Meredith, J.

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From this judgment the plaintiffs appealed, and the appeal was argued on 10th February, 1903, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET, and BRITTON, JJ.

S. Alfred Jones, for the appeal. The arbitration clause is too wide, and covers almost every contingency. It is a hardship as against the plaintiff in compelling her to incur costs and expenses preliminary to her action, and is void as delaying payment, contrary to the Ontario Insurance Act, R.S.O. 1897, ch. 203, secs. 80, 143, 152, 153: *Re Berryman* (1897), 17 P. R. 573; *Mason v. The Massachusetts Benefit Life Association* (1892), 30 O.R. 716; *Gillie v. Young* (1901), 1 O.L.R. 368; *Mingeaud v. Parker* (1892), 19 A.R. 290. The Master's judgment is right in holding the clause ousts the jurisdiction of the Courts: *Scott v. Avery*, 5 H.L.C. 811; *Horton v. Sayer* (1859), 4 H. & N. 643, at p. 651; *Edwards v. The Aberayron Mutual Ship Insurance Society*, 1 Q.B.D. 563, at p. 596.

H. Cassels, K. C., contra. *Spurrier v. La Cloche*, [1902] A.C. 446, entirely covers this case. The cases come down from *Scott v. Avery*, 5 H.L.C. 811. Eight Judges in the exchequer chamber reversed the Court below. In the House of Lords eleven Judges were called in, and took various views as to the particular facts, but seem to agree in the principle of the decision, which upheld the right to stipulate for the settlement of disputed claims by arbitration, as a condition precedent to liability. The litigant is not precluded from relief, but the method of ascertaining the extent of the relief only is settled. *Scott v. Avery*, is much discussed in subsequent cases, and the cases have broadened considerably. The Courts now desire the parties to carry out their contract, which here is to ascertain the amount as a preliminary. No right of action is taken from the plaintiff, and the condition is not a harsh one; besides which, the parties may appoint their own forum: *The Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society* (1903), 19 Times L.R. 155. I refer to *Willesford v. Watson* (1873), L.R. 8 Ch. 473; *Employers' Liability Assurance Corporation v. Taylor* (1898), 29 S.C.R. 104, at p. 107; *Guerin v. The Manchester Fire Assurance Co.* (1898), *ib.*, 193,

at pp. 151, 152; *McInnes v. Western Assurance Co.*, 5 P.R. 242; 30 U.C.R. 580.

Jones, in reply, referred to *Tredwen v. Holman* (1862), 1 H. & C. 72.

March 28. The judgment of the Court was delivered by STREET, J.:—I agree with the judgment of my brother Meredith that the present case is governed by the decision of the Privy Council in *Spurrier v. La Cloche*, [1902] A.C. 446, and no action lies, nor does the amount payable under the policy become due, until the determination of the arbitrator to be appointed under the agreement to refer, contained in condition No. 15.

That is an agreement to refer under the 6th section of ch. 62 R.S.O. 1897, although the plaintiff has not signed it; she cannot claim under the policy without assenting to its terms: *Baker v. The Yorkshire Fire and Life Insurance Co.* (1891), 92 L.T. 111.

Condition 15 does not appear to be in contravention of sec. 80 of ch. 203 R.S.O. 1897. It is not a condition which necessarily extends the time of payment beyond sixty days after proofs of the claim have been furnished, for it may well be that the amount may be ascertained within the period mentioned.

In my opinion the appeal should be dismissed with costs.

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[DIVISIONAL COURT.]

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March 28.

THE CROMPTON & KNOWLES LOOM WORKS

v.

HOFFMAN.

*Contract—Damages—Machinery—Special purpose—Warranty—Defects—
Loss of Profits.*

Plaintiffs agreed to manufacture a goring loom fit for certain special work required by the defendants, of which purpose the plaintiffs were aware, and to deliver it by a certain time. The machine was not delivered for about a month after the time fixed, and when delivered was imperfect in not having certain fittings and in other ways necessary for its proper working.

The defendants, after applying to the plaintiffs to make good the defects, had to do so themselves.

In an action for the price:—

Held, that the defendants should be allowed the sums paid in supplying the missing portions of the machine and for the services of an expert to put it in working order.

Held, also, that, notwithstanding the property in the loom by the contract remained in the plaintiffs until paid for, as they never had supplied a machine properly constructed to do the work required of it, there was a warranty, express or implied, that it should be fit for such purpose; and that as the defendants, although they did their best to remedy the defects, were prevented from earning what they would have earned if the loom had been complete, the plaintiffs were liable for loss of profits.

Judgment of MacMahon, J., reversed in part.

THIS was an appeal by the defendants from a judgment of MacMahon, J., for \$495.63, with interest from the 1st of October, 1900, in favour of the plaintiff company, and dismissing the defendants' counterclaim, without costs, in an action tried before him, without a jury, at Stratford, on the 23rd of September, 1902.

The following facts are taken from the judgment of STREET, J., in the Divisional Court:—

The action was brought to recover the price of a goring loom and fittings, which the plaintiffs agreed to manufacture and deliver to the defendants for \$662.63: payable, one-half cash, one-quarter on first of December, 1900, and one-quarter on first April, 1901—the property to remain in the plaintiffs until paid for.

The contract was made partly by correspondence and partly at a personal interview on 29th May, 1900, between the defendant Hoffman and an officer of the plaintiff company,

named Hitchins, at which the latter agreed that the loom should be fit for the special work required by the defendants, and should be shipped by the 25th June, 1900.

On the 27th June the defendants wrote the plaintiffs, asking when it would be shipped, as they were anxious to do work; the plaintiffs replied that they proposed to ship it a week from the following Monday.

On the 10th July the plaintiffs wrote again that it was nearly completed: as a fact, however, the loom itself reached the defendants only on 22nd July, and a large number of the fittings were not with it.

From this time until after the end of the year 1901, the defendants were not supplied with certain necessary fittings which the plaintiffs had contracted to sell to them, and without which the defendants were unable to work: they wrote several letters asking for these fittings, and finally were obliged to construct them or obtain them elsewhere. Besides this, there were certain defects in the loom which it was necessary to correct before it would do the work for which it was intended.

The defendants spent much time and labour in endeavouring to correct these defects themselves, and finally they employed an expert mechanic from Buffalo, who set them right in a few days.

The defendants counterclaimed for damages for the loss of the profits they sustained by reason of the defective condition of the machine supplied them, for the time and labour expended in endeavouring to make it work, for the material it spoiled, and for the services of the expert, etc.

The learned Judge allowed the defendants \$69 for the sums paid out by them in supplying the missing portions of the loom, and for the expense of obtaining the services of the expert from Buffalo, who finally put the loom in working order: but he disallowed all the other expenses to which the defendants were put, and he allowed nothing for loss of profit on the grounds: first, that they could not be recovered while the property remained in the plaintiffs: and second, because the missing parts of the machine might have been obtained elsewhere, and the defects in its construction might have been remedied in a few days had a competent mechanic been

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D. C.	employed for the purpose. He therefore gave judgment for the	
1903	plaintiffs for the contract price of the machine and fittings:	
CROMPTON		\$664.63
LOOM WORKS	Less cash, - - -	\$100.00
v.	Deduction as above, -	69.00
HOFFMAN,		<hr/>
		169.00
	Balance, - - - - -	<hr/>
		\$495.63
Besides interest from 1st October, 1900, and the costs of the action.		

The appeal was argued on the 9th of February, 1903, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ.

G. G. McPherson, K.C., for the appeal. The evidence shews that the loom was not delivered in time; that the fittings were not complete; that there were structural defects in it; in fact, although it was ordered for a certain purpose, and to do certain special work which was stipulated for, and which the plaintiff company well knew, it would not do the work it was intended to do; and the defendant is not only entitled to all his expenses for putting it in order and making it fit to do the special work, but for all his loss of profit incurred before it was put in order: *Hadley v. Baxendale* (1854), 9 Ex. 341; *In re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), L.R. 6 Eq. 396; *Jaques v. Millar* (1877), 6 Ch. D. 153; *Cory v. The Thames Ironworks, etc., Co.* (1868), L. R. 3 Q. B. 181; *Wilson v. The General Iron Screw Colliery Co.* (1878), 47 L.J.Q.B. 239; *Cull v. Roberts* (1897), 28 O.R. 591.

E. Sydney Smith, K.C., contra. The evidence shews that the defendant did not understand the machine he wanted, and that he experimented for himself in attempting to correct alleged defects. The facts are found in favour of the plaintiff company by the trial Judge; there were no structural defects, and even if there were any minor ones, they were easily rectified if properly attended to. I also rely on *Hadley v. Baxendale*, 9 Ex. 341; *Gee v. The Lancashire and Yorkshire R.W. Co.* (1860), 6 H. & N. 211; *Sedgwick on Damages*, 8th ed., pp. 217, 218; *Fuller v. Curtis* (1884), 100 Ind. 237; *McCormick v. Vanatta*

(1876), 43 Ia. 389; *Osborne & Co. v. Poket* (1884), 33 Minn. 10; *Brayton v. Chase* (1854), 3 Wis. 456; *Frye v. Milligan* (1885), 10 O. R. 509; *Tomlinson v. Morris* (1886), 12 O. R. 311; *Anderson v. North-Eastern R.W. Co.* (1861), 4 L.T.R.N.S. 216.

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McPherson, in reply.

March 28. The judgment of the Court was delivered by STREET, J.:—The plaintiffs agreed either that the loom and fittings should be shipped to the defendants on or about 25th June, 1900, or else that it should be shipped within a reasonable time from the giving of the order: and looking at all the circumstances I think it is not unreasonable to hold that it should have been shipped so that the defendants might, had it been complete and properly constructed, have been able to work profitably upon it by the 1st August. But the plaintiffs never in fact supplied all the fittings they had agreed to supply, and they never supplied a loom properly constructed to do the work required of it by the defendants, and to do which the plaintiffs well knew the machine had been ordered.

The defendants repeatedly wrote the plaintiffs pointing out that parts of the fittings necessary to enable them to work, and which the plaintiffs had promised to supply to them as part of their contract, had not been sent: and they endeavoured themselves without success to correct the defects in the machine so as to make it do their work.

It appears that the loom in question was not known in Canada, and no mechanic in Canada had the necessary knowledge of its parts to enable him to correct what was wrong. The evidence shews that in the condition in which the loom was supplied by the plaintiffs it was impossible that it could be made to do the work for which it was intended. An expert came from Buffalo early in March, 1901, and set it right in a very few days, and since then it has worked properly.

The plaintiffs were made aware of the particular purpose for which the loom was required and they were furnished with a piece of web of the kind it was to make, and there was an implied if not an express warranty, that it should be fit for the purpose of making similar web.

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Street, J.

When the plaintiff sues for the price of the machine it is held in *Cull v. Roberts*, 28 O.R. 591, that a defendant may rely upon a breach of warranty to reduce the claim even although the property has not passed to him.

My brother MacMahon has allowed the defendant to reduce the purchase money by the actual cost of the repairs necessary to enable him to complete the loom.

There is, however, this further consideration, that the plaintiffs failed to supply the defendants with a completed machine of any kind, and that the result was to prevent them for several months from earning the profit they would have earned had the machine been complete. It is quite true that a purchaser under such circumstances is not allowed to sit still with his hands folded and allow the profits the machine would have earned to run on against its price. These defendants did not do that: they repeatedly but in vain called the attention of the plaintiff to the fact that part of the contract had not been filled and they endeavoured all the time to remedy the defects.

It appears to me under the circumstances that it does not lie in the plaintiffs' mouths to say that although the machine sent by them was a defective one, yet a competent mechanic could have set it right in a few days; the fact being that a competent mechanic was not to be found in the country, and it was necessary to import one from Buffalo for the purpose.

The defendants, in fact, appear to have been using their best endeavours in good faith from the time the loom reached them to make it work: it would not work owing to inherent faults which they used every reasonable means to discover and correct. It was the plaintiffs' fault that defendants did not, for at all events a considerable time, earn the profits from the use of the machine which the plaintiffs knew when it was ordered they expected to earn, and they are liable in my opinion to make these profits good: *Waters v. Towers* (1853), 8 Ex. 401; *Cory v. The Thames Ironworks, etc., Co.*, L.R. 3 Q.B. 181; *The Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q.B.D. 670.

The defendants put these profits at five cents to eight cents a yard on an output of six hundred yards a week, equal to \$30 a week at the lowest figure named.

I think it would not be unreasonable to say that the defendants were justified for at least six weeks in waiting for the parts which the plaintiffs had not sent, and in looking about them for the proper means of setting the defects right, and to allow them \$180 for loss of profits in addition to the \$69 allowed them by the judgment appealed against.

In my opinion, therefore, the judgment should be reduced from \$495.63 to \$315.63 and the latter sum should bear interest from 1st October, 1900, and the defendants should have the costs of the present appeal set off against the plaintiffs' debt and costs. In other respects the judgment should stand.

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[OSLER, J.A.]

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KENNAN ET AL. V. TURNER ET AL.

March 19.

Assessment and Taxes—Tax Sale—Invalidity—Onus—Proof of Taxes in Arrear—Omission of Clerk to Furnish Treasurer with Assessor's Return—Irregularity—Action not Commenced within Three Years—Pleading—Amendment.

In an action brought on the 23rd April, 1902, for a declaration that a tax sale and conveyance under which the defendants claimed title to, and were in possession of, a certain town lot, were illegal and void as against the plaintiffs, the rightful owners, the plaintiffs proved a sufficient paper title. It was also proved that one of the defendants was in possession and had erected a valuable building, claiming title under a sale by the town treasurer, made on the 7th October, 1898, for arrears of taxes for 1895, 1896, and 1897, and a deed made in pursuance thereof on the 15th November, 1899, registered 12th December, 1899, by the proper officials to the assignee of the tax purchaser, and a subsequent conveyance, duly registered, to the defendant in possession:—

Held, that the onus of proof of the invalidity of the tax title rested on the plaintiffs.

Taxes for the whole period of three years next preceding the 1st January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day, the lot was, by sec. 152 of the Assessment Act, R.S.O. 1897, ch. 224, liable to be sold in 1898 for such arrears.

The proceedings leading up to the sale were substantially regular, with one exception, the omission of the clerk of the municipality to furnish the treasurer, as he is required to do, by the last clause of sec. 153, with a true copy of the list furnished by the latter under sec. 152, with the assessor's return, certified to by the clerk under the seal of the corporation:—

Quære, whether this requirement of sec. 153 was of so essential a character as, conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action came into operation.

Love v. Webster (1895), 26 O.R. 453, distinguished.

Held, however, that as in this case the taxes had been legally imposed the omission worked no injury to the plaintiffs, who had all the notices and delays to which they were entitled, and in respect to whose land all the other conditions essential to a valid tax sale existed, and, as the action was brought more than three years after the sale and more than two years after the deed, the defendants were entitled to rely upon secs. 208 and 209 of the Assessment Act as a defence.

ACTION for a declaration that a certain tax sale and conveyance under which the defendants claimed title to, and were in possession of, lot 8 on the west side of Pilgrim street, block C, Eldridge subdivision plan, in the town of Sault Ste. Marie, were illegal and void as against the plaintiffs, the rightful owners of the said lot. The facts are stated in the judgment.

The action was tried before OSLER, J.A., at Sault Ste. Marie, on the 3rd and 4th November, 1902.

J. E. Irving, for the plaintiffs.

W. H. Hearst, for the defendants.

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March 19. OSLER, J.A.:—At the trial of the action, the plaintiffs proved a sufficient paper title to the lot. But it was also proved that the defendant Turner was in possession and had erected a valuable building thereon, claiming title under a sale by the town treasurer, made on the 7th October, 1898, for arrears of taxes for 1895, 1896, and 1897. A deed made in pursuance thereof on the 15th November, 1899, registered on the 12th December, 1899, by the proper officials to the assignee of the tax purchaser, and a subsequent conveyance to the defendant Turner duly registered, were also proved.

The action was not brought until the 23rd April, 1902.

The onus of proof of the invalidity of the defendants' tax title, by the form of the record, and the nature of the relief sought, rested on the plaintiffs.

The plaintiff Kennan paid the taxes on the lot for the year 1893, and in 1895, for the year 1894 also. These were the last payments made by him; and although, in the year 1898, he made some attempt to pay the taxes of 1895, the sum he sent was not enough, and was returned by the treasurer to, and was accepted by, him. He then said he would send the full sum, but never did so.

The assessment rolls for the years 1895, 1896, and 1897, were proved. The lot appears therein to be assessed to the plaintiff Kennan. It appears to have been duly and regularly assessed in that way, although it was not occupied, and Kennan did not reside in the country. He was known to be the owner, and it will be assumed that, as he had notice of the assessment, not only in that year, but in subsequent years, and did not appeal therefrom, he had requested his name to be set down in the assessment roll.

It was proved that the taxes imposed in respect of the said assessment were duly entered upon the collector's roll for each of these years; that the collector was unable to collect them; and that they were returned by him uncollected, the reason

Osler, J.A.
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assigned being "non-resident," to the treasurer of the municipality, in each year, as required by sec. 147 of the Assessment Act. The clerk at the same time received or retained what I must hold to be a sufficient duplicate of the collector's accounts, though irregular in form; and, as required by the same section, sent notice to the plaintiff and others of the arrears of the taxes which appeared to be due by them for each year respectively. Taxes for the whole period of 3 years next preceding the 1st day of January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day (sec. 152, last clause) the lot in question was liable to be sold for the whole of such arrears during the year 1898 (sec. 152.)

The treasurer's list of lands in the town of Sault Ste. Marie (including this lot) liable to be sold for taxes during that year was furnished, as required by sec. 152, by him, to the clerk, on the 31st January, 1898.

The clerk filed the list in his office, and delivered a copy of it to the assessor for 1898, as required by sec. 153. The lot was still, as it had hitherto been, unoccupied; but the plaintiff, though not residing within the municipality, being known to be the owner, the assessor notified him that the lot was liable to be sold for arrears of taxes, and made the proper entry thereof in his list; and returned such list to the clerk with the assessment roll. The clerk filed it in his office for further use. I do not find that the assessor signed the list, as required by sec. 153, but he attached to it (printed thereon and signed by him) his certificate, as required by sec. 154 of the Act, of the performance of the duties required of him in respect thereto. The certificate is verified, as the section requires, by the oath of the assessor, indicated sufficiently, I think, though in a rather informal manner, by an underwritten *jurat*.

The clerk seems to have performed the duty, imposed on him by sec. 155, of examining the assessment roll of 1898 when returned by the assessor, and furnishing the town treasurer with a list, called "occupied return," of lands and lots embraced in the treasurer's list furnished to him under sec. 152, which appeared on the resident assessor's roll of 1898 as having become occupied, or insufficiently described, etc. The

lot in question was, of course, not in the list so furnished under sec. 155, being shewn, as I have said, by the assessor's return to the treasurer's list to be unoccupied.

The clerk, however, omitted to furnish the county treasurer, as he is required to do by the last clause of sec. 153, with a true copy of the list furnished by the latter under sec. 152, with the assessor's return certified to by the clerk under the seal of the corporation, which is, in effect, the treasurer's list with the assessor's annotations thereon.

According to the evidence of the treasurer, it had not, until very recently, been the custom in this municipality to do so, because by comparing the duplicate of the list furnished by the treasurer under sec. 152, with the "occupied return" received by him from the clerk under sec. 155, the treasurer got all the substantial information he would have got from a copy of his own list with the assessor's notes or remarks thereon, and it was assumed that lands embraced in the treasurer's list, but not found in the "occupied return," would be sold. The subsequent proceedings, the mayor's warrant to the treasurer to sell, the advertisement of the sale, and the sale, all followed in regular order, and were completed by the deed under which the defendants make title, as already mentioned.

A long string of objections was taken to the tax sale, beginning with the assessor and collectors, whose actual appointments, it was said, were not proved, nor that they had taken the necessary oaths of office; that the assessment rolls were verified by the certificate of the assessor, instead of by his affidavit; that the collectors' rolls were not returned in time, etc.; and many others. It seemed to me that the only formidable objection was as to the clerk's omission to do the act required by the last part of sec. 153, viz., to furnish the county treasurer with a true copy of the assessor's return in respect of the lands listed by the treasurer for sale under sec. 152.

If the case turned upon it, I should probably feel bound, sitting here, to follow the opinion expressed by Armour, C.J., in *Love v. Webster* (1895), 26 O.R. 453, in respect of this very objection, although not necessary for the determination of that case. See also per MacMahon, J., in *Wildman v. Tait* (1900), 32 O.R. 274, 283. In neither of these cases, however, nor in

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the cases of *Jeffery v. Hewis* (1885), 9 O.R. 364, *Dalziel v. Mallory* (1888), 17 O.R. 80, *McKay v. Chrysler* (1879), 3 S.C.R. 436, and *Whelan v. Ryan* (1891), 20 S.C.R. 65, was there any valid assessment of the land afterwards sold; and therefore there were no taxes in arrear at the time of the sale. So in *Donovan v. Hogan* (1888), 15 A.R. 432, it appeared that the taxes for which the sale had taken place, had been paid before the sale.

In the case before me, the taxes for the three years, 1895, 1896, and 1897, had been regularly and validly imposed and assessed. They were all due and in arrear before the sale in October, 1898, and the tax for the year 1895 had been due for the third year, or for the three years, preceding the sale.

Whether the requirement of sec. 153, to which I have referred, is of so essential a character as, even conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action comes into operation, I do not decide. It is arguable that it is only intended for evidential purposes. But in this case, it will be observed, that its omission worked no injury to the plaintiffs, who had all the notices and delays to which they were entitled; and in respect to whose land all the conditions essential to a valid tax sale thereof, except the one I have mentioned, if it were one, existed.

The action not having been brought for more than three years after the sale, and more than two years after the deed, the defendants plead in answer to it the provisions of secs. 208 and 209 of the Assessment Act, which, in my opinion, constitute a complete defence. They also relied upon a similar section, 1 Edw. VII. ch. 70, sec. 2 (O.) The proviso of that section, so far as it is intelligible to me, seems, however, to exclude its operation in this case, the whole of the taxes not having been due for three years before the sale. A more carefully drawn provision with a similar object in view is found in the Port Arthur Act, 1 Edw. VII. ch. 65, sec. 2 (O.)

The action, in which I may say there is not the least merit aside from legal objections to the proceedings, but very much the reverse, is therefore dismissed with costs.

[FALCONBRIDGE, C.J.K.B.]

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March 20.

Municipal Elections—County Councillor—Disqualification—Membership in School Board “for which Rates are Levied”—Resignation between Nomination and Polling—Relator’s Claim to Seat—Notice to Electors.

By 2 Edw. VII. ch. 29, sec. 5 (O.), sec. 80 of the Municipal Act R.S.O. 1897, ch. 223, is amended so as to provide that “no member of a school board for which rates are levied” shall be qualified to be a member of the council of any municipal corporation.

The respondent was a member of a school board for a section which had no school or teacher of its own; but the board was organised, and paid over the rates levied on the section to the board of an adjoining section, which provided accommodation for the school children living within the first-named section:—

Held, a school board for which rates are levied, within the meaning of the amendment.

Held, also, following *Regina ex rel. Rollo v. Beard* (1865), 3 P.R. 357, and *Regina ex rel. Adamson v. Boyd* (1868), 4 P.R. 204, that the respondent, being a member of a school board on the day of the nomination for the office of county councillor, was disqualified for the latter office, although he resigned his membership in the school board before the day of polling.

No objection to the respondent’s qualification was taken until the day of polling, on which day notices were posted up in five out of the twelve polling booths warning the electors not to vote for the respondent:—

Held, not sufficient to entitle the relator to the seat.

AN application to set aside the election of the respondent to the county council of the county of Welland, for the electoral district in the county comprising the townships of Humberstone and Crowland and the village of Port Colborne, upon the grounds stated in the judgment.

The application was made before the deputy Judge of the county court of Welland, Mr. T. D. Cowper, K.C.

W. M. German, K.C., for the relator.

L. C. Raymond, for the respondent.

February 18. COWPER, Dep. Co. J.:—The election was held on the 22nd December, 1902, and the 2nd January, 1903. Both the relator and the respondent were candidates, the respondent being successful at the polls. The respondent took the declaration of office about the 15th January last.

Objection is taken to his election on the ground that he was a school trustee of school section 8 of the township of Humberstone, on the 22nd December last, the day of nomination, and that he is, therefore, disqualified under the Act of the

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last session of the Legislature, 2 Edw. VII. ch. 29, sec. 5, amending sec. 80 of the Municipal Act, R.S.O. 1897, ch. 223, by placing members of school boards for which rates are levied in the same category as Judges, county Crown attorneys, and others mentioned in that section, in regard to their disqualification from being members of the council.

It is proved that the respondent was a member of the school board of school section 8, and that he resigned therefrom on the 31st December last (after the nomination, but before the polling), and it is contended that under sec. 80 he is disqualified from membership *only* in the council, but that he was not disqualified from being a candidate, and that his resignation before polling day and before taking the oath of office (and thus, it is argued, before he became a member of the council), removes him from the operation of the section in question.

It was also urged that the school board of which he, the respondent, was a member was not one falling within the purview of the amending Act, inasmuch as it was not a school board for which rates are levied.

The facts in connection with this school section are somewhat unusual. It was not contended that the section was not regularly organized, but it was distinctly proved that there was no school within its boundaries, and no teacher taught within its limits. The school children living therein attend school at Port Colborne, and the school rates levied on the section, and the moneys got by the board from the council under the Public Schools Act, are paid by the board to the Port Colborne board, which provides the accommodation for the pupils resident within the section under consideration.

Mr. Raymond, for the respondent, argued that the trustees, under these circumstances, did not fall within the terms of the amending Act of last year.

I am unable to accede to this argument. The statute uses the words "for which rates are levied," and it is proved beyond question that rates are levied in this section, at the instance of the school board for the section. I must, therefore, I think, give effect to the argument of counsel for the relator that the levying of the rate is the point referred to in the statute, and that the ultimate use to which these moneys are put by the

board cannot affect the question to be determined in these proceedings.

The other question raised requires more consideration, and perhaps a review of the statute law dealing with councils and their composition.

Prior to 1896, county councils were composed of the reeves and deputy reeves from the local municipalities forming the county, and these persons were also members of the councils of the local municipalities. Thus there were no members of the county councils who were not as well members of the local councils. This state of affairs continued until 1896, when an Act of the Legislature was passed dividing the counties into county council divisions, and providing for the election of two members from each division, and these persons so elected formed the county council.

From what has been said, as to the composition of the county council, prior to 1896, it follows that the qualifications of its members were the qualifications provided for membership in the local councils in so far as the reeves and deputy reeves are concerned, and that, therefore, the section as to qualification in the local council (now sec. 76 of the Municipal Act, R.S.O. 1897, ch. 223), applied to the members of the county council as well.

An examination of this section (76) shews that it cannot apply to the county council as now constituted at all. It speaks of "mayor, alderman, reeve, deputy reeve, or councillor of any local municipality."

The interpretation clause of the Act, sec. 2; sub-sec. 9, tells us that local municipality means "a city, town, township, or incorporated village."

It is manifest, therefore, that sec. 76 does not apply to membership in the county council.

Before leaving sec. 76, attention should be drawn to the fact that the words in connection with the election are, "no person shall be qualified *to be elected* a mayor," etc. The words in italics find no place in sec. 80, to which reference will be made hereafter.

To refer for a moment to the qualification of a county councillor. Section 77 of the Municipal Act provides that

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"every member of a county council shall possess the same property qualification as the reeve of a town is required to possess, and shall also be a resident of the county council division for which he is a county councillor."

This section differs very materially from sec. 76, as will appear on further examination of the two sections.

It now becomes necessary to consider sec. 80, as amended by the Act of last session, and to inquire whether that applies to the case in hand, and whether the respondent is disqualified thereunder.

After enumerating several classes of persons, amongst whom must now be placed "members of school boards for which rates are levied," the section enacts that none of them "shall be qualified to be a member of the council of any municipal corporation."

That this applies to county councils, I think there can be no doubt, although it is difficult to see why public school trustees should be prohibited from being members of the county council, since, whatever they may have to do with local councils in their official capacity, they can have nothing whatever to do with the council of the county.

In my opinion, however, the section, applying as it does to county councils, prohibits school trustees, as defined by the amending Act, from being members thereof. This leads to a consideration of the question, when does the time come at which one becomes a member of the county council. Is it when he is nominated? Clearly not, where some other person is nominated against him. Does he become a member when the result of the polling shews he has been elected? I think not. I think something more remains to be done, although in determining this case, it is not necessary to decide this point.

To apply what has already been said to the case in hand.

The respondent was unquestionably a public school trustee at the time he was put in nomination for the county council on the 22nd December last. It is equally clear that he was not a trustee on polling day, the 2nd January last, for he resigned from the school board, and his resignation was accepted, and another trustee elected in his place, on the 31st December.

He was, therefore, not disqualified from membership in the county council by reason of his being a school trustee, for at the time he became a *member* of the council he did not occupy the other position.

In my opinion, the reasoning in the judgment of Hagarty, J., in the case of *Regina ex rel. Rollo v. Beard* (1865), 3 P.R. 357, cited in the case of *Regina ex rel. Adamson v. Boyd* (1868), 4 P.R. 204, bears out this view. In the *Beard* case the respondent had been elected a councilman for St. James ward, Toronto, and his election was moved against, on the ground that he had a contract with the city. It was argued for the respondent that the disqualification related not to the time of the election but to the time at which the respondent took his seat. The learned Judge, in commenting on this, uses the following language (3 P.R. at p. 364): "Mr. Robinson, for the defendant, argues with much force and ingenuity, that even if the respondent were disqualified for the above reason when elected, the objection was wholly removed before he took his seat in the new council. . . The last Act governing this case is C.S.U.C. ch. 54, sec. 73, . . that no disqualified person 'shall be qualified to be a member of the council of the corporation;' and the argument is, that this points not to the time of election, but to becoming a member, or, in other words, taking a seat in the new council. . . But the last statute says . . 'the persons qualified to be elected mayors, members, etc., are such, etc., as are not disqualified under this Act. . . ' First, we have a declaration that the persons qualified to be elected are those not disqualified under the Act. Next, we have a list of disqualifications which prevent persons becoming members of the council."

It will be observed from this extract that the statute law when that case was decided was much the same as that set forth in secs. 76 and 80 of our present Municipal Act. The learned Judge reached his decision by reading the law as set forth now in these two sections, together. But, for the reasons I have already given, sec. 76, while it applies to the councils of cities, towns, townships, and villages, does not now apply to county councils, and, therefore, in my opinion, the case in hand differs altogether from the cases cited by counsel, which were

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all cases respecting councils in local municipalities, or county councils prior to the radical change in 1896.

This case is so important in principle and the question of law raised is of such wide spread interest, that I have thought it advisable to express my views at some length, especially as I am differing from what at first glance may be considered authorities to the contrary.

There remains but one point to be spoken of.

The relator in these proceedings claims the seat. Should there be an appeal from my judgment, and should it be reversed, I desire to say that, in my opinion, he is not entitled to it. The facts in connection with this point as proved before me are, that no objection whatever to the respondent's qualification was taken until the day of polling. On that day the relator posted up notices in 5 of the polling booths—there are twelve in the district, and there is no evidence as to the other 7—which, he says, contained a warning to the electors not to vote for the respondent, as he was not qualified. No copy of the notice was produced before me. It is clear, I think, on the authorities, that this notice does not entitle the relator to the seat, and that, should my judgment be reversed, there must be a new election: *Regina ex rel. Adamson v. Boyd*, 4 P.R. 204.

I may sum up my findings and conclusions as follows.

1. The respondent was nominated for the county council on the 22nd December last.

2. The respondent was a member of the school board of school section 8, Humberstone, on that date.

3. The respondent ceased to be a member of that board on the 31st December, when his resignation was accepted and his successor appointed.

4. The polling took place on the 2nd January last, when the respondent was elected by a majority of votes over the relator.

6. The respondent made the declaration of office on or about the 15th January last.

7. The disqualifications set forth in sec. 80 refer to the time a person becomes a member of the council, and do not refer to the time of the election—that is, so far as membership in the county council is concerned.

8. It is only when it is necessary to read secs. 76 and 80 together, *e.g.*, where membership in a local municipal council is concerned, that sec. 80 refers to the time of the election, and not to the membership.

9. Section 220, I think, clearly shews that there is a difference between "being elected" and "becoming a member," for it provides that proceedings to question an election must be taken "within six weeks after an election, or one month after acceptance of office by the person elected."

I, therefore, find and declare that the respondent was duly elected a member of the county council of Welland for division No. 3; that he is not disqualified from holding his seat; and that the proceedings against him must be dismissed with costs, and his election confirmed.

The relator appealed, and his appeal was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court, on the 26th February, 1903.

The same counsel appeared.

March 20. FALCONBRIDGE, C.J.:—This is an appeal from the county court of Welland county. The learned officiating Judge of that Court found and declared that the respondent was duly elected a member of the county council of Welland; that he was not disqualified from holding his seat; and that the proceedings against him should be dismissed with costs, and his election affirmed. The facts of the case are fully set forth in the elaborate and considered judgment of the learned Judge.

The question arises under the amendment to sec. 80 of the Municipal Act, introduced by 2 Edw. VII. ch. 29, sec. 5, whereby "a member of a school board for which rates are levied" is added to the list of those who are under the ban of disqualification for the office of member of the council of any municipal corporation. There was no school within the boundaries of this particular section, and no teacher taught within its limits. But the section was organized, with a secretary and treasurer, and the school rates levied on the section and other moneys received by the board under the Act were paid by the board to the board of an adjoining section

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which provided accommodation for the school children living within the first-named section.

It was argued for the respondent, that the trustees, under these circumstances, did not fall within the terms of the amending Act. I entirely agree with the learned Judge in declining to accede to this contention, for the reason which he gives, viz., that rates are levied in this section at the instance of the school board for the section, and that the ultimate destination of the moneys does not affect the point.

But I find myself, with respect, unable to come to the same conclusion as the learned Judge has done with reference to the other question raised. He has dealt with the case with much erudition and ability; but I venture to think that the fallacy of his argument consists in this: that, even assuming that sec. 76 does not, in view of the interpretation clause (sec. 2 of the Municipal Act, sub-sec. 9,) apply in terms to a county council, that section deals with qualification only: now sec. 80, on the other hand, deals with disqualification, and the decisions on the subject, which are so old and of so high authority, cannot be distinguished or ignored. It is laid down in the plainest terms in *Regina ex rel. Rollo v. Beard*, 3 P.R. 357, that disqualification has relation to the time of the election, and not merely to the time of the acceptance of office. That judgment was approved in *Regina ex rel. Adamson v. Boyd*, 4 P.R. 204, where it is further distinctly stated (p. 214) that the day appointed for the nomination is the day of election, and the disqualification of a candidate has reference to that day.

The learned Judge has found that no objection to the respondent's qualification was taken until the day of polling, on which day notices were posted up in five out of the twelve polling booths (there being no evidence as to the other seven), which notices contained a warning to the electors not to vote for the respondent.

This is not a notice sufficient to entitle the relator to the seat, and there must, therefore, be a new election.

The appeal will, therefore, be allowed, and the election of the respondent declared to be invalid, and there must be a new election held to fill the vacancy hereby created.

The relator must have his costs here and below.

E. B. B.

[IN CHAMBERS.]

REX EX REL. MCLEOD V. BATHURST ET AL.

1903

March 21.

*Municipal Elections—Irregularity—Quo Warranto Application—Status of Relator
—Voting for Respondent—Disclaimer.*

The relator attacked the election of the respondents as county councillors for non-compliance with certain statutory formalities:—

Held, that the relator, by voting for M., one of the respondents, who was in the same class with the others, acquiesced in and became a party to the irregularity, and could not be heard to complain. The fact that M., after service of the notice of motion, disclaimed office, was *nihil ad rem*.

AN appeal by the relator from an order of the Judge of the county court of the united counties of Stormont, Dundas, and Glengarry, dismissing an application in the nature of a *quo warranto* to set aside the election of the respondents as councillors for the united counties.

The appeal was heard by FALCONBRIDGE, C.J.K.B., in Chambers, on the 27th February, 1903.

I. F. Hellmuth, K.C., for the relator.

D. B. MacLennan, K.C., for the respondents, objected to the status of the relator, upon a ground appearing in the judgment.

The appeal was heard subject to the objection.

March 21. FALCONBRIDGE, C.J.:—I am of the opinion that the objection to the status of the relator is well taken, and that the learned Judge of the county court has correctly distinguished the case of *Regina ex rel. Coleman v. O'Hare* (1855), 2 P.R. 17.

The notices of motion here and below and the elaborate argument based thereon, attacked the whole election as invalid by reason of the alleged non-compliance with certain formalities which the relator contended were imperative and obligatory.

It was not asserted (except in the case of Bathurst) that there was anything working personal disqualification of the persons who were declared elected.

Therefore the relator, by voting for Finnan McDonald, who was in the same class with the other respondents, acquiesced in and became a party to the irregularity, and cannot now be

Falconbridge, heard to complain. The fact that Finnan McDonald, after service of the notice of motion on him, disclaimed office, seems to be *nihil ad rem*. The matter is to be dealt with on the state of facts existing when these proceedings were launched.

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See, also, *Regina ex rel. Pomeroy v. Watson* (1855), 1 U.C.L.J. 48; *Regina v. Lofthouse* (1866), L.R. 1 Q.B. 433; *Regina ex rel. Harris v. Bradburn* (1876), 6 P.R. 308.

The appeal will be dismissed without costs.

E. B. B.

[DIVISIONAL COURT.]

D. C.

DAVIDSON V. THE GRAND TRUNK RAILWAY COMPANY.

1903

March 4.

Railway—Defective fencing—Cattle getting on to highway and then on to track—Negligence.

The plaintiff was the owner of a field, bounded on one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway, which was crossed by both tracks. Owing to a defect in the fence between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed and going over the land of a private owner, which was not fenced off from the switch, and then along a lane she went on to the highway and then proceeded along it to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train :—

Held, that the defendants were liable therefor.

James v. The Grand Trunk Railway Co. (1901) 31 S.C.R. 420, distinguished.

THIS was an appeal by the defendants from the judgment directed to be entered by the Judge of the district court of the district of Muskoka, after the trial of the action before him with a jury on the 17th June, 1902.

The facts so far as material are set out in the judgment.

On February 17th, 1903, before a Divisional Court composed of MEREDITH, C.J.C.P., and STREET, J., the appeal was argued.

D. L. McCarthy, for appellant. No liability as against the defendants was proved, and the action against them should have been dismissed. *James v. Grand Trunk R.W. Co.* (1901),

31 S.C.R. 420, is expressly in point. It was decided in that case that there was no obligation to maintain line fences between the land on which their line runs and the lands of an adjoining owner, which was the case here, and also that there is no liability, where animals are running at large on the highway, from whence they stray on to the track and are injured. This later principle is borne out by the previous decisions: *Thompson v. Grand Trunk R.W. Co.* (1859), 18 U.C.R. 92; *Ferris v. Grand Trunk R.W. Co.* (1857), 16 U.C.R. 474. Here the cow was unlawfully on the highway, from whence it strayed on to the track of the main line, and was killed. County Court costs should not have been allowed, as the action could properly have been brought in the division court.

T. E. Godson, for respondent. The primary cause of the damage was the defect in the fence between the switch and the plaintiff's land, and therefore rendered the defendants liable. The case of *James v. Grand Trunk R.W. Co.*, 31 S.C.R. 420, does not decide that there is no liability here. All that was decided there was that there was no obligation to fence a culvert, the fences in other respects being in accordance with the statute. As to the costs, this was a matter in the discretion of the trial Judge, and the Court will not interfere with their discretion.

March 4. MEREDITH, C.J.:—As far as the main question—the liability of the appellants for the loss sustained by the respondent by the killing of his cow—is concerned, we can interfere only if there was no evidence to go to the jury (R.S.O. 1897, ch. 55, sec. 52, sub-sec. 4); but that is unimportant in this case for the facts are undisputed, and the real question is whether on those facts the liability of the appellants for the loss has been made out.

The respondent is the owner of a field in the township of Thorah, bounded on the north or north-east by the main line of the appellants' railway, and on the south or south-west by another line of railway of theirs, which is called "the switch," and the field abuts upon the Mara road, which is crossed by both of these lines.

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The cow, which was killed, was in this field, and during the night of the 16th August, 1901, owing to a defect in the appellants' fence on the south-west side of the field, separating it from the "switch," escaped from the field on to the switch, which she crossed, and there being no fence between the switch and the land of the private owner opposite to the respondent's field, she went across this private land a very short distance to a lane leading to the Mara road, used as a means of ingress and egress to and from a warehouse built partly on the appellants' land and partly on the private land, and extending up to the private land. She then passed along this lane to the Mara road, and then northward along that road to the main line, and there she crossed the cattle-guard at the point of intersection of the main line with the Mara road, and went along the main line a distance of fifteen yards to the place where she was killed by a passing train of the appellants.

So far the facts are not in dispute, and there was also uncontradicted evidence from which the jury were warranted in finding that the cattle-guard at the intersection of the main line with the Mara road was not suitable and sufficient to prevent cattle and other animals from getting on the railway.

Upon this state of facts there was, I think, evidence sufficient to warrant the verdict for the plaintiff, unless the effect of the decision of the Supreme Court in *Grand Trunk R. W. Co. v. James* 31 S. C. R. 420, is to determine that upon the true construction of section 194 of the Railway Act (Dominion), as amended by 53 Vict. ch. 28, sec. 2 (D.), the appellants are not liable, because the respondent's cow was killed not upon the switch, on to which she escaped from the adjoining land of the respondent, but upon the main line on to which she did not escape directly from that land, but which she reached by the route I have mentioned.

In the view of Mr. Justice Gwynne and of Mr. Justice Sedgewick, with whom the Chief Justice agreed, the obligation of a railway company under this legislation is not to maintain line fences between the land upon which their line runs and the lands of the adjoining owner, but to maintain fences of the description prescribed by the statute, sufficient to prevent cattle from getting from the adjoining land on to the railway, and the

result was that the plaintiff failed on the main ground upon which he rested his case, for there had been no breach of the duty imposed by section 194 on the railway company, because the maintenance of the fences which they had erected was on that construction of the section a complete fulfilment of the obligation imposed on them by the statute.

Mr. Justice Gwynne was also of opinion that even if the duty of the railway company had been as great as it had been held by the Court of Appeal to be, the plaintiff could not recover, because, as he said, between the omission to fence and the defect in the land owner's fence alongside the highway, in consequence of which the horses got upon the highway, there was no connection whatever.

All three of the judges were of opinion that as far as the plaintiff's case was based on section 271 it failed also, because the horses were upon the highway unlawfully, and by the provisions of sub-section 3 of that section, the plaintiff had therefore no right of action against the railway company for killing them.

It was, however, not decided, and it was not necessary for the disposition of the case to decide, that where the statutory duty as to fencing is not performed, and in consequence of that breach of duty cattle of the land owner escape directly from his land on to the line of the railway, the railway company are liable only when the cattle are killed on the part of the line on to which they have escaped directly, and not where they are killed on another part of the line, to which they have strayed after passing, as the respondent's cow did, over intervening lands.

In my opinion, on the facts of this case, we ought to hold that there was evidence to go to the jury. As I have pointed out, the judgment of the Court of Appeal in the *James* case was reversed for reasons which do not touch the question of liability where a breach of the statutory duty has been committed by the railway company, and the consequence of that breach has been the killing of the cattle of the land owner on the railway and by the railway company's train.

I can see nothing in the provisions of the Railway Act which renders it necessary to decide that the land owner may

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not recover where his cattle are killed not on the part of the railway to which they have gone directly from his land, but on another part of the line, or on another line of the railway company to which they have strayed after passing over intervening lands.

That in such a case he may recover was the view of the Court of Appeal, and the reasoning which led to that view being taken commends itself to my mind as sound, and the conclusion reached, if not binding on us, is, I think, one that we should follow.

In my opinion, upon the facts of this case, the appellants' breach of duty was the proximate cause of the killing of the respondent's cow, and the appellants are not entitled to invoke against the respondent the provisions of section 271; and if not bound to follow, I am content to adopt the reasons of the learned Judges of the Court of Appeal for coming to a like conclusion in the *James* case as my own for coming to my conclusion in this case.

The appeal, so far as it relates to the question of the liability of the appellants, therefore fails, and it fails also as to the question of costs, the disposition of which was in the discretion of the Judge, who, as far as it has been made to appear, exercised his discretion in awarding them as he has done, and has not exercised it upon a wrong principle or on a misapprehension of the facts.

The appeal is dismissed with costs.

STREET, J., concurred.

G. F. H.

[IN THE COURT OF APPEAL.]

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v.

THE CORPORATION OF THE TOWNSHIP OF YARMOUTH ET AL.

C. A.

1902

Aug. 18.

Municipal corporation—Railway crossings—Liability to repair—Railway—Municipal Act, secs. 602-611—Railway Act, 51 Vict. ch. 29. sec. 186 (D).

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March 14.

By sec. 611 of the Municipal Act, R.S.O. 223, first introduced into the Municipal Act in 1896, no liability is now imposed on a municipal corporation for want of repair of a railway crossing by reason of its being of too high a grade and the omission to fence, the obligation therefor being under sec. 186 of the Railway Act, 51 Vict. ch. 29 (D) solely on the railway company.

THIS was an appeal from the judgment of Falconbridge, C.J.K.B., in an action tried before him, without a jury, at St. Thomas on the 17th and 18th June, 1902.

The action was brought by Edwin Holden and Sarah Holden, his wife, against the corporation of the township of Yarmouth, the Michigan Central Railway Company, and the Canadian Pacific Railway Company, for damages sustained by the plaintiffs through alleged negligence of the defendants.

At the trial the action was dismissed by consent of the plaintiffs against the Canadian Pacific Railway Company.

The evidence, so far as material, is set out in the judgment of GARROW, J.A.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment:—

August 18. FALCONBRIDGE, C. J.:—Action against the Canadian Pacific Railway Company dismissed without costs at the hearing.

The effect of the evidence on my mind is that there was some noise from the train, either sudden rattle of cars or draw bars, or sudden escape of steam which startled the horse just as the hind wheels of plaintiff's vehicle were clearing the eastern track, and that this, combined with the state of the highway, caused the accident. The highway ought to have been railed at that point. It is not easy to generalize in these municipal cases. Talbot road is one of the principal roads in the county,

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and the proximity of the *locus* to the city and to the railway track, with the other surrounding conditions, lead me to find that there ought to have been a railing, and that the absence of a railing was one of the proximate causes of the injury: *Toms v. Corporation of Whitby* (1874), 35 U. C. R. 195, and *Sherwood v. Corporation of Hamilton* (1875), 37 U. C. R. 410, and approved of in *Foley v. Township of East Flamboro'* (1899), 26 A. R. 43, and I think not discredited by *Bell Telephone Co. v. City of Chatham* (1900), 31 S. C. R. 61.

In a case where the sensations and symptoms of the patient are so largely subjective, as they are here, it will be reassuring to the plaintiffs when I find that the condition of Mrs. Holden is by no means so serious, nor is her reasonable expectation of life so greatly impaired by the accident as she (perhaps honestly) now thinks. I must place some discount on the prospective profits of the hotel business at Yarmouth Centre.

I assess damages against both the township and the Michigan Central Railway Company as follows: to the male plaintiff \$400 (\$50 for his own injuries and \$350 for loss of consortium and service), and to the female plaintiff \$1,200, with costs.

From this judgment the defendants, the corporation of the township of Yarmouth and the Michigan Central Railway Company, appealed to the Court of Appeal.

On February 12th and 13th, before Moss, C. J. O., MACLENNAN, GARROW, and MACLAREN, J. J. A., the appeal was argued.

Hellmuth, K. C., for the appellants, the Michigan Central Railway Company.

Aylesworth, K. C., for the corporation of the township of Yarmouth.

W. R. Riddell, K. C., for the respondents.

On the conclusion of the argument, the Court allowed the appeal of the Michigan Central Railway Company, but reserved judgment as to the corporation of the township of Yarmouth.

March 14. The judgment of the Court was delivered by GARROW, J. A.:—This is an appeal by the defendants, the Michigan Central Railway Company and the corporation of the township of Yarmouth, against the judgment of Falconbridge, C.J., who tried the action without a jury, and awarded damages to the plaintiffs against both defendants.

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The action was apparently, by consent of the plaintiffs, dismissed at the trial as against the defendants, the Canadian Pacific Railway Company, without costs; and at the close of the argument of the appeal before us, the appeal of the defendants, the Michigan Central Railway Company, was allowed.

The remaining question is, therefore, as to the liability of the defendants, the corporation of the township of Yarmouth.

The facts, so far as material, are as follows: On November 1st, 1901, the plaintiffs, husband and wife, were travelling from the city of St. Thomas towards their home at Yarmouth Centre, along what is known as the Talbot road, in a buggy to which was attached a young and spirited horse. The line of railway built and owned by the Canadian Pacific Railway Company, but at the time in question leased or used by the Michigan Central Railway Company, crosses the Talbot road just outside the limits of the city of St. Thomas. The crossing is a level one, but the approach to the track has been apparently graded up to reach the necessary level of the track, about four feet above the natural level or surface in that vicinity, leaving, as a consequence, a declivity at each side of that depth. No railing had been placed along this declivity, and the absence of such railing is the negligence complained of as against these defendants.

When the plaintiffs approached the crossing in question, a freight train with a Michigan Central engine stood on the track. It pulled out of the way, and the plaintiffs proceeded to cross, when just as the rails had been passed, the horse reared and turned sharply to the right, ran down the before mentioned declivity, and into a private lane, and finally into an orchard before he was stopped. The female plaintiff was thrown out to the left, the hind wheel of the buggy passed over her, and she was severely injured. The male plaintiff was finally thrown out in the orchard, and injured, but to a much less extent. The buggy did not upset while on the highway.

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The *via trita* at the place in question is twenty-one feet wide. The highway is otherwise in good repair.

The learned Chief Justice, by the consent of the parties, had a view of the *locus in quo* before he gave judgment.

He says in the notes of judgment: "The effect of the evidence on my mind is that there was some noise from the train, either sudden rattle of cars or draw bars or sudden escape of steam which startled the horse just as the hind wheels of plaintiff's vehicle were clearing the eastern track, and that this, combined with the state of the highway, caused the accident. The highway ought to have been railed at that point. It is not easy to generalize in these municipal cases. Talbot road is one of the principal roads in the county, and the proximity of the *locus* to the city and to the railway track, with the other surrounding conditions, lead me to find that there ought to have been a railing, and that the absence of a railing was one of the proximate causes of the injury."

This is perhaps not an explicit finding of negligence against the defendants, the corporation of the township of Yarmouth, although that is the result.

As defined in numerous cases, it is the duty of the municipality to keep its highways in a reasonable state of repair. What is a reasonable state of repair depends upon the facts in each particular case, and hence the difficulty pointed out by the learned Chief Justice of generalizing or of laying down any general rule on the subject.

It has already been determined in more than one case in this Province that where a railing is necessary, it is negligence not to provide it: *Toms v. Corporation of Whitby*, 35 U.C.R. 195; 37 U.C.R. 100; *Sherwood v. Corporation of Hamilton*, 37 U.C.R. 410.

Looking at the facts as reported in these cases as a guide, does not help the plaintiffs here. In the former the declivity to be guarded against had a descent of fourteen feet, at the foot of which was a stream — a very obvious danger, one would think; while in the latter it is called a dangerous precipice on a hill side.

Talbot road, at the place in question, is practically level, except for the grading up to the railway crossing: the level

surface which might be travelled is said to be thirty feet wide, and the actual *via trita* in constant use and quite level is, as before mentioned, twenty-one feet wide.

But for the fact of the railway-crossing interfering with the highway to some extent and increasing the dangers of travel upon it, I think it may be assumed from his language that the learned Chief Justice would not have found a railing necessary.

At all events, dealing with the question of fact, and speaking for myself, I am of the opinion that the finding, so far as the railing is concerned, can only be justified on the ground that the *locus in quo* is an approach to a railway crossing.

Talbot road is an old and well-known highway, which had existed for many years before the railway crossing it was constructed, indeed before the age of railways in this Province.

The facts, historically, are rather meagre in the printed case, local knowledge on both sides having been apparently imported as matter for judicial notice rather than proved. One of the witnesses, however, speaks of the highway having been in its present condition since 1893, which was probably the date of the construction of the railway.

There is no evidence that sec. 186 of the Railway Act, 51 Vict. ch. 29 (D.) was ever complied with. That section requires that "any approach by which any roadway is carried over or under any railway or across it *at rail level* shall not be greater than one foot of rise or fall for every twenty feet of the horizontal length of such approach, unless the railway committee direct otherwise, and a good and sufficient fence shall be made on each side of such approach . . . which fence shall be at least four feet in height from the surface of the approach."

This imposes a plain statutory duty, not involving any nice questions of reasonable repair, etc., such as constantly arise in actions against municipal corporations, and an action would undoubtedly lie against the railway company at the instance of any one who had suffered injury owing to a neglect of such duty. The railway company in default in the present instance were the defendants, the Canadian Pacific Railway Company; and if any of the defendants should pay, that company is the one apparently primarily liable. That liability, however, cannot now be made effectual, because, as before pointed out, the

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action as to that company was dismissed at the trial with the plaintiffs' consent.

Under these circumstances, it appears to me that sec. 611 of the Municipal Act, R.S.O. 1897, ch. 23, which was not brought to the notice of the learned Chief Justice, affords a complete defence to the defendants, the corporation of the township of Yarmouth, by which it is provided that nothing contained in secs. 606 to 610 (which impose the statutory duty upon municipal corporations to keep their highways in repair) shall cast upon the municipal corporations any obligation or liability in respect of acts done or omitted to be done by other persons, companies, or corporations acting in the exercise of powers or authorities conferred upon them by law, and over which such municipal corporations have not control.

Section 611 was first introduced in the Municipal Amendment Act, 1896, 59 Vict. ch. 51, sec. 22 (O.).

Before the last mentioned statute, it had been held under states of facts not unlike those in question here, that a prior neglect by a railway company of its statutory duty with respect to approaches to crossings did not excuse the municipal corporations from their statutory obligation to keep such approaches as part of the highway in repair: *Mead v. Township of Etobicoke* (1889), 18 O.R. 438; *Fairbanks v. Township of Yarmouth* (1897), 24 A.R. 273.

The injury in the latter case took place on February 23rd, 1895. The judgment of the learned Chancellor, who tried the case, was given on February 13th, 1896, or about two months before the final passing of the statute before referred to, which was assented to on April 7th, 1896, probably in consequence of these decisions.

It is not, I think, necessary to say more than that, in my opinion, the facts in this case very clearly fall within the exception created by sec. 611 rather than within the rule as stated in sec. 606, and that for this reason the defendants, the corporation of the township of Yarmouth, are not liable to the plaintiffs' claim, and the appeal by these defendants should therefore be allowed, but, under the circumstances, without costs, and the action dismissed with costs.

G. F. H.

[IN CHAMBERS.]

KINGSTON V. THE SALVATION ARMY.

1903

*Parties—Unincorporated Association.*April 11.
May 4.

The Salvation Army, the duly appointed officers of which are entitled under R.S.O. 1897, ch. 162, to solemnize marriages, and which, under R.S.O. 1897, ch. 307, may hold property in Ontario, may be sued in the courts of Ontario.

A MOTION by the defendants, the Salvation Army, to set aside, for the reasons stated in the judgment, the service upon them of the writ of summons, was argued before Mr. Winchester, the Master in Chambers, on the 9th of April, 1903.

A. E. Hoskin, for the Salvation Army.

D. L. McCarthy, for the plaintiffs.

April 11. THE MASTER IN CHAMBERS:—This is an action brought by the plaintiffs to recover damages from the defendants for injuries sustained through the running away of a horse frightened by the noise occasioned by the defendants, McQuarrie and Austin, while conducting religious services as members of the defendants, the Salvation Army, in a street in the city of Hamilton. The noise was made by the beating of a drum, etc.

The defendants, the Salvation Army, move for an order setting aside the service of the writ of summons herein on one D. F. McAmmond, for the defendants the Salvation Army, and for an order striking out the name of the Salvation Army as parties defendants, on the grounds (1) that the Salvation Army is not an incorporated society or body, and is not a partnership; (2) that the said Salvation Army is under the sole control of General William Booth, in whom the property is vested either personally or in the name of trustees for him; (3) that the said D. F. McAmmond is not a proper party to be served on behalf of the said army, and the said General Booth has no agent in Canada upon whom process can be served.

From the examination of Major Creighton, who is also the accountant and assistant property secretary of the Salvation Army, it appears that McAmmond, who was served with the

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writ of summons herein, is a staff-captain, having charge of the work in Hamilton. The methods of the army respecting the holding of property, as also obtaining it, are fully set out in the major's evidence. They are also set out in a book issued by General Booth, who is the head of the army, entitled, "Orders and regulations for field officers of the Salvation Army," at pp. 305, 475, 344-5, 589, etc. The Salvation Army is a religious body, acknowledged to be so by the Ontario statute, R.S.O. 1897, ch. 162, sec. 2 (3), where it provides that "any duly appointed commissioner or staff-officer of the religious society called the Salvation Army, chosen or commissioned by the said society to solemnize marriages," may solemnize the ceremony of marriage between any two persons not under a legal disqualification to contract marriage. The army is also entitled to hold property under the Act respecting the property of religious institutions, R.S.O. 1897, ch. 307. It appears that the real estate and other property purchased by the army is first taken in the name of the commissioner in Ontario for the time being, and subsequently conveyed to General Booth, who holds it as trustee for the army under a deed poll dated the 7th of August, 1878, and enrolled in the chancery division of the High Court of Justice in England for the purposes therein set out: see pp. 305-6-7 of the Orders and Regulations for Field Officers.

The question of serving the Amalgamated Sheet Metal Workers' International Association was considered by the Divisional Court last month: see *Metallic Roofing Co. v. Amalgamated Sheet Metal Workers' Association* (1903), 5 O.L.R. 424. That association was neither a corporation nor a partnership nor an individual carrying on business in a name or style other than his own name. It had been held by Meredith, J., on an appeal from an order made in Chambers, that the service of the writ of summons on a person, an officer of the association in Ontario, should stand good. The Divisional Court, however, held that it not having appeared that the association had been given by the legislation the capacity for owning property, and acting by agents, such as in *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, it was held the legislation had conferred upon the

defendants in that case, such service should be set aside, although the name of the association was not struck out from the style of cause.

In this case the defendants, the Salvation Army, are entitled by the legislation to hold property, and they do hold property of various kinds in this Province. In my opinion, therefore, this fact brings it outside the decision of the Divisional Court in the *Metallic Roofing* case, and that for the reasons set out in the judgments of the Master in Chambers and Meredith, J., the service herein should not be set aside. Liberty to the defendants to enter a conditional appearance. Costs in the cause.

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An appeal by the defendants from this order was argued before BRITTON, J., in Chambers, on the 20th of April, 1903.

A. E. Hoskin, for the defendants.

D'Arcy Tate, for the plaintiffs.

May 4. BRITTON, J.:—Upon this motion, I allowed the affidavit of Mr. Ogden to be read together with the declaration of trust of General Booth.

While not wholly free from doubt, I agree with the learned Master.

It was contended by Mr. Hoskin, in his very able argument that this case is on all fours with *Metallic Roofing Company of Canada v. Amalgamated Sheet Metal Workers' Association*, 5 O.L.R. 424. The Salvation Army in this case is sued as a quasi-corporate body, just as the defendants in the *Taff Vale* case.

It is said that the *ratio decidendi* in *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, was that "a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name." That is in fact the language of Lord Brampton, but the case goes farther, and involves more than that, and has much in common with the present case.

The Salvation Army is a large and most important association and organization. It has not been defined or created a corporation by any Act of Parliament. It was held in the *Taff Vale* case that "it is competent to the legislature to give to an

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association of individuals which is neither a corporation, nor a partnership, nor an individual, a capacity for owning property and acting by agents. And such capacity, in the absence of express enactment to the contrary, involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents." This association has the distinctive name given to it by its founder and head, General Booth. This army is at work in Canada, and in the declaration of trust by General Booth, he says "that the name, style and title by which the said religious community or society herein-before described is now and is henceforward to be known and recognized is 'The Salvation Army.'"

As the learned Master says, any duly appointed commissioner or staff-officer of the Salvation Army, chosen or commissioned by the said society to solemnize marriages, is authorized to do so in Ontario by R.S.O. 1897, ch. 162, sec. 2.

Then this is a "religious community or society" within the meaning of, and with the powers conferred by, R.S.O. 1897, ch. 307.

It seems to me not desirable to extend non-liability to an association, such as the Salvation Army, if it so happens that some one, acting entirely within the rules, and for the army, does a wrong for which he himself would be liable.

Of course, in determining the question of holding the army by name as a party to the action, I am expressing no opinion on the merits, but the language of Farwell, J., in the *Taff Vale* case, is apt if we use the words "army work" for the word "strike." He says (p. 431): "The acts complained of are the acts of the association. They are acts done by their agents in the course of the management and direction of army work; the undertaking such management and direction is one of the main objects of the defendant society, and is perfectly lawful; but the society, in undertaking such management and direction, undertook also the responsibility for the manner in which the *army work* is carried out. The fact that no action could be brought at law or in equity to compel the society to interfere or refrain from interfering in army work is immaterial; it is not a question of the rights of members of the society, but of the wrong done to persons outside the society. For such

wrongs, arising as they do from the wrongful conduct of the agents of the society in the course of army work, which is a lawful object of the society, the defendant society is, in my opinion, liable." See also Lord Halsbury's opinion, pp. 439, 440.

The general question is an important one, but I cannot think the Salvation Army would care to allow the brunt of the liability to be borne by McQuarrie and Austin alone, if, in what they were doing, they were merely acting as officers and in the interests of the Salvation Army.

Appeal dismissed; costs in the cause to the plaintiffs.

R. S. C.

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[DIVISIONAL COURT.]

CHANDLER AND MASSEY, LIMITED, v. GRAND TRUNK RAILWAY COMPANY.

D. C.
1903

Parties—Joinder of Defendants—Alternative Claims—Con. Rule 186.

A machine sold by the plaintiffs was burnt while in the premises of the defendant railway company at the place for its delivery to the purchaser. The plaintiffs brought this action against the railway company as carriers for the value of the machine and in the alternative against the purchaser for the price:—

Held, that this could not be done, the relief claimed against the railway company being based on the assumption that the title to the machine was in the plaintiffs, and that against the purchaser on the assumption that title had passed to him.

Quigley v. Waterloo Manufacturing Co. (1901), 1 O.L.R. 606, and *Evans v. Jaffray* (1901), 1 O.L.R. 614, applied.

April 3.
May 5.
May 15.

A MOTION by the defendants, the railway company, to compel the plaintiffs to elect whether they would proceed with the action against them or against their co-defendant Kerr, was argued before the Master in Chambers, on the 2nd of April, 1903.

D. L. McCarthy, for the defendant company.

W. A. Sadler, for the plaintiffs.

C. A. Moss, for the defendant Kerr.

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April 3. THE MASTER IN CHAMBERS:—This is an action brought by the plaintiffs against the defendants, the Grand Trunk Railway Company and one William Kerr, to recover the sum of \$457 damages in respect of the following matters set out in the statement of claim. It is alleged therein that the defendant Kerr purchased from the plaintiff company, on the 4th of November, 1902, a static machine and X-ray outfit of the value of \$430, and one "Ideal" water meter of the value of \$27, to be shipped from Toronto to the said defendant, f.o.b. at Dunnville, freight prepaid, *via* the Grand Trunk Railway Company. On the 7th of November, 1902, the plaintiffs delivered to the defendant company for carriage for hire, and they received as common carriers under bill of lading, the said machines to be carried to Dunnville, and to be there delivered to the defendant Kerr safely and in good order.

The said machines arrived at Dunnville on the 10th of November, 1902, and on the evening of that day were destroyed by fire while in the freight shed of the defendant company, and while still in the possession and custody and under the control of the defendant company, and before their duty as common carriers had been terminated by delivery to the defendant there as consignee.

"6. Alternatively, if there was delivery, actual or constructive, of the said goods by the defendant company to the consignee, the defendant William Kerr, the plaintiffs claim that the defendant William Kerr is liable to them for the price of the said goods, and claim to recover the same from him in this action."

The defendant company now applies for an order requiring the plaintiffs to elect as against which of the defendants they will proceed with the action, on the ground that the statement of claim discloses distinct and separate causes of action, etc.

In support of the application counsel relied on the decision in *Quigley v. Waterloo Manufacturing Co.* (1901), 1 O.L.R. 606, while counsel for the defendants relied on *Evans v. Jaffray* (1901), 1 O.L.R. 614, and the cases referred to therein.

It appears to me that the reference of the Chancellor, in *Quigley v. Waterloo Manufacturing Co.*, 1 O.L.R. at p. 613, to the judgment of Malins, V.-C., in *Clark v. Rivers* (1867), L.R.

5 Eq. at p. 97, covers the position of this case exactly. He says: "Formerly an action could not be maintained in the alternative. You might ask alternative relief against the same defendants, but you could not bring in different defendants and say, 'If I am not entitled to relief against A., I am entitled to it against B.' You had to make up your mind against whom you were entitled to relief. That has been measurably remedied by Rule 186, but not so as to cover every case in which a plaintiff may have a cause of action against A. or B. in the alternative so that they may be joined as defendants:" *per* Cockburn, C. J., in *Honduras R. W. Co. v. Tucker* (1877), 2 Ex. D. 301. The cases have at present defined the limits as being where the transactions involve dealings with principal and agent and landlord and tenant, even though the cause of action may be in form different, if there is substantially one legal transaction, having different aspects, in which the defendants are implicated."

In the present case the plaintiffs claim as being owners of the machines in their claim against the defendant company, while in their claim against the defendant Kerr they claim that he is the owner. It, therefore, falls without the scope of Rule 186 as interpreted in the above cases.

The order will go staying proceedings until the plaintiffs elect as to which defendant they intend proceeding against with the action. In case they abandon the action against the defendant company, the action will be dismissed with costs, including the costs of this application; but in case they abandon against defendant Kerr, the action as against him will be dismissed, and the costs of this application will be to the defendant company in any event.

An appeal by the plaintiff from this order was argued by the same counsel before Britton, J., in Chambers, on the 20th of April, 1903.

May 5. BRITTON, J.:—The order appealed from was made upon the application of the defendants, the Grand Trunk Railway Company, upon an affidavit, on information and belief, that these defendants are prejudiced and embarrassed in this action by reason of the joinder of a distinct and separate cause

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of action against the defendant, William Kerr. Considering the facts as set out in the statement of claim and affidavits, I do not see how the Grand Trunk Railway Company can be either prejudiced or embarrassed, as the sole question for these defendants is as to liability for destruction of certain goods, and if liable at all, it can make no difference whether liable to plaintiffs or to the defendant Kerr, and if the Grand Trunk Railway Company are liable whether the liability is to the plaintiff, or defendant Kerr, depends entirely upon what the defendants themselves have done in reference to these goods, because unquestionably at the time of their delivery to the Grand Trunk Railway Company they were the property of plaintiffs.

I have no doubt that as a matter of convenience and saving of expense to all parties, this is a case where the plaintiffs should be at liberty to join the defendants.

There is, however, the question of law.

It is contended that Rule 186 applies only to cases of joinder of defendants in reference to one cause of action and that it has no application to any case where there are two distinct and different causes of action, one against one defendant, or in the alternative, the other cause of action against the other defendant, even if the action arises about the same subject matter. It is argued that this rule is limited to cases where the right to relief is founded strictly and technically upon the same cause of action. A careful perusal of the cases cited will not warrant the conclusion that the rule is absolutely so limited and restricted.

The learned Master thought this case covered exactly by *Quigley v. Waterloo Manufacturing Co.*, 1 O.L.R. 606. That case goes a long way and to further restrict Rules 186 and 192 would practically destroy their usefulness.

This case is, I think, distinguishable. Here there are technically two causes of action but not such as are referred to in the *Quigley* case and other cases cited. There is practically only one thing to determine, and that is the liability of the Grand Trunk Railway Company for the destruction of the goods. The plaintiffs as part of their case must shew that they are the owners of the goods—and *prima facie* they were the owners, as they were the shippers—but the Grand Trunk

Railway Company say they have delivered these goods to the other defendant who was the consignee. The other defendant denies this, and the proper determination is a matter of law depending upon the facts as between the two defendants.

In this case the plaintiffs sold property to the defendant Kerr, to be delivered to him f.o.b. at Dunnville, freight paid, *via* Grand Trunk Railway Company of Canada. This property, after delivery to the Grand Trunk Railway Company, and after its arrival at Dunnville, and while it was in the freight shed of the Grand Trunk Railway Company, and on the day of arrival, was destroyed by fire. The defendant Kerr refuses to pay for this property because he did not get it. The Grand Trunk Railway Company deny liability for the loss of the property, and they say further as part of their defence, that the plaintiffs are not entitled to sue, as the property had been actually or constructively delivered to the defendant Kerr. All the plaintiffs desire is to get pay for this property, if any one is liable for it under the circumstances. The Grand Trunk Railway Company, it is contended, are liable. And if at the time of its destruction this property had been delivered to Kerr, then Kerr is liable to the plaintiffs. This seems to me a singularly proper case for the application of the rule.

It is one cause of action as against the defendant company. The plaintiffs cannot join Kerr as a co-plaintiff. It is a proper thing to bring in Kerr and have him bound in this action by the determination of the one question of delivery of goods.

It would be quite wrong in my opinion to compel the plaintiffs in the first instance to elect as to which defendant should be pursued, and to dismiss the action against the other. Trying two separate actions it would be quite possible for the plaintiffs to lose both on the determination of an issue that could be determined once for all as between the parties in one action.

Rule 192 can well be applied here. There is doubt—a doubt arising only as to what are the facts as between the defendants.

If Kerr really intends to rely upon any other defence than non-delivery, and desires a separate trial, that could, if a proper case be made for it, be ordered under Rule 237.

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If there are two distinct causes of action, and only one subject matter, the goods and their destruction, the thing common is the ownership of goods when destroyed: see *Child v. Stenning* (1877), 5 Ch. D. 695; *Harvey v. Great Western R.W. Co.* (1881), 9 P.R. 80; (1882), 7 A.R. 715; *Cox v. Barker* (1876), 3 Ch. D. 359; *Honduras Inter-Oceanic R.W. Co. v. Lefevre* (1877), 2 Ex. D. 301; *Bennetts v. McIlwraith & Co.*, [1896] 2 Q.B. 464; *Tate v. Natural Gas and Oil Co.* (1898), 18 P.R. 82; *Evans v. Jaffray*, 1 O.L.R. 614; *Langley v. Law Society of Upper Canada* (1902), 3 O.L.R. 245. *Quigley v. Waterloo Manufacturing Co.*, 1 O.L.R. 606, is relied on by the defendants, but I think upon the facts in this case, that case, strong as it is, hardly goes the length of denying to plaintiff the right to join where the liability for loss of goods is the one question common to all.

Appeal allowed, costs in the cause to the plaintiffs.

The defendants, the Grand Trunk Railway Company, then appealed to the Divisional Court, and the appeal was argued before MEREDITH, C.J., C.P., and FERGUSON, J., on the 15th of May, 1903. The same counsel appeared.

At the conclusion of the argument the judgment of the Court was delivered by MEREDITH, C.J.:—It is impossible to reconcile all the cases upon this subject, but we think the practice laid down by the more recent cases is clear, and that the order of the Master was right and should not have been reversed. In some of the cases before *Smurthwaite v. Hannay*, [1894] A.C. 494, it does not appear to have been noticed that as was pointed out in that case the group of Rules which were relied upon dealt not with the joinder of causes of action but with joinder of parties, but since that case all the decisions in England are in harmony, except perhaps *Kent Coal Exploration Co. v. Martin* (1900), 16 Times L.R. 486. Collins, L.J., puts the matter very clearly in *Thompson v. London County Council*, [1899] 1 Q.B. 840, at p. 844. Two cases seem to be the other way, viz., *Honduras R.W. Co. v. Tucker*, 2 Ex. D. 301, and *Bennetts v. McIlwraith & Co.*, [1896] 2 Q.B. 464, but in each case there was but one cause of action, as is

pointed out by Collins, L.J., in the *Thompson* case at p. 845. We must interpret Rules 186 and 192 in the light of the authorities, and follow *Quigley v. Waterloo Manufacturing Co.*, 1 O.L.R. 606, which proceeds upon the English cases. Here the causes of action against the two defendants are distinct, and they cannot be sued in the alternative. The appeal should be allowed and the order of the Master restored. In view of the conflict of decisions, there will be no costs either here or below.

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[IN CHAMBERS.]

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REX EX REL. O'DONNELL V. BROOMFIELD.

April 6.

Municipal Elections—County Councillor—School Trustee of Board for which Rates Levied—Disqualification—Objection Before Election—Resignation Before Taking Office—New Election—R.S.O. 1897, ch. 223, sec. 76—2 Edw. VII., ch. 29, sec. 5.

A relator in an application in the nature of a *quo warranto* is not entitled to the seat where he neither objects to the disqualification of the respondent at the nomination nor gives any notice on the election day to the electors that they were throwing away their votes.

Section 76 of the Municipal Act relating to the qualification of different members of local municipalities does not apply to county councillors.

The resignation by a school trustee after his election as county councillor and before taking his seat does not remove his disqualification arising from the fact that he was a member of a school board for which rates were levied.

Regina ex rel. Rollo v. Beard (1865), 3 P.R. 357, followed.

The words "for which rates are levied" used in 2 Edw. VII., ch. 29, sec. 5 (O.), disqualify any member of the council of any municipal corporation who was at the time of his election a member of a school board for which rates were levied whether levied by the municipal corporation of which he was elected a member or by any other.

The saving clause in section 5 refers to the election of the member of the council of any municipal corporation and not to the election of a school trustee: *Rex ex rel. Zimmerman v. Steele*, ante 565, followed.

THIS was an application in the nature of a *quo warranto* to set aside the election of one William Broomfield as a county councillor, on the ground that he was disqualified to sit as such, as he was a member of a school board for which rates were levied, under the circumstances set out in the judgment, and to have the seat awarded to one Michael O'Donnell, an unsuccessful candidate at the election.

The motion was argued in Chambers on the 17th February, 1903, before Mr. Winchester, the Master in Chambers.

John A. McGillivray, K.C., for the relator.

John E. Farewell, K.C., for the respondent.

April 6. THE MASTER IN CHAMBERS:—This is an application for an order declaring that the respondent William Broomfield has not been duly elected, and has unjustly usurped, and still doth usurp, the office of county councillor in the county of Ontario, under the pretence of an election held on the 5th day of January, 1903, in division number seven of the

said county of Ontario, and that the relator, Michael O'Donnell, was duly elected thereto, and ought to have been returned at such election, and declaring that he, the said relator, has an interest in the said election as a candidate upon the following, among other grounds, namely:—

That the said William Broomfield was not duly or legally elected or returned in this: that at the time of the said election, and prior and subsequent thereto, he was a member of a school board for which school rates were levied, namely, of the board of school trustees for school section number three in the township of Mara, in the said county of Ontario.

The affidavit of the relator in support of his application states; that he was one of the candidates for election for county councillor in division No. 7 of the county of Ontario, held on the 5th day of January last: the other candidates being Donald Brown, of the township of Thorah in said county, and the respondent herein—there being three candidates only; and the two receiving the highest number of votes were the said Donald Brown and the respondent, who were declared elected. That the respondent at the time of the said election, and prior and subsequent thereto, held the position of public school trustee in and for school section No. 3 of the said township of Mara, and was therefore a member of a school board for which rates were levied. That he, the relator, received the next highest number of votes at the said election for county councillors in said division No. 7 of the said county of Ontario, and claims to be entitled to be declared elected in the place of the respondent.

His affidavit is supported by one from a member of the board of school trustees, setting forth the connection of the respondent with the school board, which continued up to the 15th January, 1903, and that the said board is a board for which school rates were levied, there being no township board of school trustees for the township of Mara.

The relator made another affidavit, subsequent to the service of the notice of motion herein, in which he states that he wrote the clerk of the county council for the county of Ontario on the 6th day of January last, notifying him that the respondent was disqualified, and not to declare him elected to the office of county councillor for the seventh division of the county of

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Ontario, he, the said respondent, having been a public school trustee; and that on the 27th January last he served the respondent with a notice claiming the office of county councillor on the ground that the respondent was disqualified for the position by reason of his being a public school trustee; and that this notice was served before the respondent took his seat as a county councillor.

In answer to the application, the respondent in an affidavit states that at the time of the passage of the Municipal Amendment Act, 1902, being ch. 29, 2 Edw. VII. (O.), he was a member of the board of public school trustees for school section No. 3 in the township of Mara, and also one of the members of the county council of the county of Ontario for No. 7 county council division of said county. That neither at the nomination of candidates for election of members to represent said county council division, nor during the contest for such election, nor during the day of the holding of the poll for such election, was his (respondent's) attention called to the provisions of the said statute by the relator nor by any agent on his behalf, nor was the attention of the municipal electors present at the said nomination called to the fact that he was such school trustee, nor was it stated or alleged by or on behalf of the said relator that he (the respondent) was not qualified to be a member of the municipal council of the county of Ontario, nor was any public opportunity given to the electors of said No. 7 county council division, to nominate any other candidate for such election in case it should be held that he (the respondent) was not qualified to be a member of said county council. That to the best of his knowledge, information and belief, no notice was given to the electors of said division, that they would be throwing away their votes by voting for him at said election, and that when his attention was called to his alleged disqualification, and before he took the declaration of property qualification and of office, required to be taken by all members of county councils before taking their seats, to wit, on or about the 15th January, 1903, he resigned the office of school trustee of school section No. 3; and that when he became a member of the municipal council of the county of Ontario, as he is advised and believes, he was not a member of a school board for which

school rates were levied. He further adds in his affidavit, that he is advised and believes, as the law was at the date of the passing of the said Municipal Amendment Act, 1902, the said county council of the county of Ontario did not nor was it empowered to raise any rates for or in respect of said school section No. 3 of the said township of Mara for any purpose whatever.

An affidavit of one Gilbert Gillespie was filed on behalf of the respondent, in which he states that after the election on the 5th January, and after the relator had consulted his solicitor, he called upon Gillespie and told him, and some others who were present, what his solicitor had told him, and said that he, himself, knew that the respondent was disqualified because he was a public school trustee, "but that he was so sure he would defeat Mr. Broomfield at the election, that he had never thought of saying anything to the electors about the matter."

The relator files an affidavit of his own in reply to that made by Gillespie, but he says nothing whatever to contradict the above statement.

The certificate of the clerk of the county council shews that the result of the election was as follows:—

Donald Brown received	-	-	861 votes
William Broomfield received	-	-	846 "
and Michael O'Donnell received	-	-	544 "

thus shewing a majority of 300 votes in favour of the respondent over the relator.

It appears to me, that the object in making this application, is not so much to have the election of the respondent set aside, as to have the seat awarded to the relator without running the risk of a new election. Under the authorities the relator is not entitled to the seat. To entitle a candidate to the seat claimed by him on the ground of his opponent's disqualification, it must be shewn that the qualification was objected to at the nomination, so that the electors might have an opportunity of nominating another candidate: *Regina ex rel. Ford v. McRae* (1870), 5 P.R. 309, at p. 315; *Regina ex rel. Tinning v. Edgar* (1867), 4 P.R. 36; *Regina ex rel. Adamson v. Boyd* (1868), *ib.* 204. In this latter case the late Judge John Wilson, at p. 214,

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said: "The relator, in the first instance, claimed to be entitled to his seat; but this is not seriously urged, for he gave no notice on the day of nomination that the defendant was not qualified, or that he claimed to be elected . . . by reason of the non-qualification of Boyd. In *Regina ex rel. Forward v. Detlor* (*ante* p. 198), I lately held that a candidate who claims to be elected by reason of the disqualification of his opponent, must distinctly so claim it at the nomination, and at the poll give notice that the electors are throwing away their votes; and he cannot be declared entitled to the seat if his conduct be equivocal, so as to mislead the electors. He cannot go to the polls, taking his chance of election, after deterring voters, and then fall back and claim his seat on grounds which by his going to the polls he has waived."

The statute under which it is claimed the respondent is disqualified is 2 Edw. VII., ch. 29, sec. 5 (O.), which amends sec. 80 of the Municipal Act, by inserting therein after the word "trustee" in the eighth line, the words "and no member of a school board for which rates are levied," and it was thereby provided that this amendment should not apply so as to disqualify any person elected prior to the passing of this Act. As thus amended, sec. 80 of the Municipal Act, being R. S. O. ch. 223, reads as follows: "No Judge . . . no High School trustee, and no member of a school board for which rates are levied . . . shall be qualified to be a member of the council of any municipal corporation."

The evidence herein shews that the respondent was elected as a member of the board of school trustees for school section No. 3 in the township of Mara, in the county of Ontario, on or about the last Wednesday of December, 1900, for a term of three years from that date.

On or about the 15th day of January, 1903, he resigned the office of school trustee with the consent, expressed in writing, of his colleagues in office, as provided by section 16 of the Public Schools Act, ch. 39, 1 Edw. VII. (O.), and he resigned such office of school trustee prior to taking the declaration of property qualification and of office, required to be taken by all members of county councils before taking their seats.

The respondent also states in his affidavit, in answer to this application, "that when I became a member of the municipal council of the county of Ontario, as I am advised and believe, I was not a member of a school board for which school rates are levied."

"7. I further say that I am advised and believe, as the law was at the date of the passing of the said Municipal Amendment Act, 1902, the said county council of the county of Ontario did not, nor was it empowered to raise, any rates for or in respect of said school section number three of the said township of Mara for any purpose whatever."

He also states that before the commencement of the proceedings herein, the relator was well aware that he had resigned his position as a school trustee.

In answer to the application, counsel for the respondent relies upon the following objections:—

1st. That section 76 of the Municipal Act, relating to the qualifications of different members of local municipalities, does not relate to the qualification of a county councillor, and therefore cannot be considered in connection with section 80 relating to the disqualification of members of the council of any municipal corporation, and that under section 80, as amended by 2 Edw. VII., ch. 29, sec. 5 (O.), the respondent was not disqualified when he became a member of the county council, that is, when he took his seat as county councillor.

2nd. That the amendment refers only to members of a council of the same municipality which levies the rates for the school board of which the councillor is also a member or trustee; and, therefore, as the county council, of which respondent is a member, does not levy rates for the school board in question, the respondent is therefore not disqualified.

3rd. That the saving clause in the amending section, namely, "this amendment shall not apply so as to disqualify any person elected prior to the passing of this Act," applies to the respondent, and as he was elected a school trustee before the passing of the Act, and his term had not expired when elected as councillor, he is entitled to the benefit of this saving clause, and is therefore not disqualified.

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As to the first objection, I agree that the 76th section of the Municipal Act does not apply to county councillors. It provides that "no person shall be qualified *to be elected* a mayor, alderman, reeve, deputy reeve, or councillor of any local municipality, unless such person resides . . . and is not disqualified under this Act. . . ."

The interpretation clause of that Act, sec. 2, sub-sec. 9, provides that the words "local municipality" shall mean a city, town, township, or incorporated village." Section 77 provides for the qualifications of a county councillor; it provides that "every member of a county council shall possess the same property qualification as the reeve of a town is required to possess, and shall also be a resident of the county council division for which he is a county councillor." The words "and is not disqualified under this Act" used in the 76th section are omitted from the 77th section, and it is therefore argued that the disqualifications mentioned in section 80 do not apply to the respondent at the time of the election as provided for by section 76, but only apply to him when he actually takes his seat and acts as a member of the county council.

I do not agree with this contention.

The late Sir John Hagarty, Chief Justice of Ontario, then a Judge of the Court of Queen's Bench, in giving judgment in *Regina ex rel. Rollo v. Beard* (1865), 3 P. R. 357, said at p. 364: "But Mr. Robinson, for the defendant, argues with much force and ingenuity that even if the defendant were disqualified for the above reason when elected, the objection was wholly removed before he took his seat in the new council. . . . He points out that in the earlier Acts, the words are that 'no disqualified person shall be elected,' etc. The last Act governing this case is Con. Stat. U.C. ch. 54, sec. 73 (similar to section 80 of the present Municipal Act), which differs from the preceding Acts, that no disqualified person 'shall be qualified to be a member of the council of the corporation,' and the argument is, that this points not to the time of the election, but to becoming a member, or, in other words, taking a seat in the new council. And Mr. Robinson urges here, that Mr. Beard wholly ceased to be a contractor, or to have any claims, before the new council had

any legal right to meet or act as such. But the last statute says in section 70 (somewhat similar to section 76 of the present Municipal Act), 'the persons qualified to be elected mayors, members, etc., are such residents of the county within which, etc., as are not disqualified under this Act, and have, at the time of their election, property,' etc. Then the disqualifying clause, section 73 (our 80) declares, amongst other disqualifying causes, 'that no person having by himself or his partners any interest in any contract, etc., shall be qualified to be a member.' First, we have a declaration that the persons qualified to be elected are those not disqualified under the Act. Next, we have a list of the disqualifications which prevent persons becoming members of the council. I feel no doubt whatever that it is at the time of the election that the qualification or disqualification of the candidate are to be considered. He is then either a qualified or disqualified person for the suffrages of the electors. I should hold the same opinion if I had nothing but the 73rd section to guide me. To refer the qualification to the time when the person elected might actually take his seat at the council board would be, in my judgment, wholly at variance with the spirit of the Act of Parliament, and fatal to the usefulness of this very wholesome provision as to disqualifications."

This judgment is peculiarly applicable to the case under consideration. At the time of the election, which has been decided again and again to commence on the day of nomination: *Regina ex rel. Rollo v. Beard*, 3 P.R. 357; *Regina ex rel. Adamson v. Boyd*, 4 P.R. 204; *Regina ex rel. Clancy v. McIntosh* (1881), 46 U.C.R. 98, at pp. 105-6; and *Regina ex rel. Taverner v. Willson* (1888), 12 P.R. 546, the respondent was a member of a school board for which rates are levied, and his resigning from that position subsequent to his election as a county councillor, will not relieve him from disqualification, if he were at the time of nomination actually disqualified, and whether he was so disqualified or not depends upon the validity of the remaining objections offered by his counsel to the application.

The second objection is as to the interpretation to be placed on the words of the amending statute, namely; "and no member

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of a school board for which rates are levied." It is contended that these words refer to a school board for which rates are levied by the municipality, for which the disqualified member was elected; and not to a member elected to the council of a municipality, which does not levy rates; that, had the Legislature desired to disqualify all school trustees, the word "High" would have simply been struck out of the seventh line of the section; or the words "for which rates are levied," would have been omitted from the amending section. No doubt, if the Legislature had seen fit to have so amended the section, the purpose intended would have been accomplished; but, that not having been done, can I place upon these words an interpretation which the Legislature has not seen proper to adopt? In referring to the interpretation to be placed on enactments of the Legislature, Sir John Boyd, in *Carroll v. Beard* (1896). 27 O. R. 349, says, at p. 358: "The legislature may not have intended that the new provision should apply to existing leases. It may have been an oversight to leave section 42 of the revised statute so that it applies to the new provision which is substituted in section 28. But if so, the modern method is to leave the remedy in the hands of the legislature, and not to qualify the enactment according to the presumed intention by judicial amendment. As aptly put by an English Judge, 'Our limited function is not to say what the legislature meant, but to ascertain what the legislature has said that it meant:' *per* Mathew, J., in *Rothschild v. Commissioners of Inland Revenue*, [1894] 2 Q.B. 142, at p. 145, and see *Gilman v. Crowley* (1857), 7 Ir. C.L.R. 557."

In dealing with the question of disqualification, the late Judge John Wilson stated what was the evident intention of the legislature regarding the same in *Regina ex rel. Boyes v. Detlor* (1868), 4 P. R. 195, where a county clerk was held to be disqualified from sitting as mayor of the same or any other municipality: "To exclude persons who might be placed in a false position, by reason of holding two offices; and no man should, if it can be avoided, be placed in a false position:" p. 196. The remaining words of his judgment set forth the principle of such exclusion. He says: "It requires no great foresight to see that a man, being a subordinate in the

municipal corporation of a county, and the head of the corporation of a town or city in that county, would have conflicting duties to perform, and would represent conflicting interests if he held these offices. To allow the defendant to be mayor while he held the office of clerk of the municipality of the county, would be contrary to the express words of the statute, and at variance with its spirit." It is not at all clear that a county councillor would not have conflicting duties to perform, and would not represent conflicting interests if he also held the office of school trustee of a school section within the county of which he had been elected a councillor. As to such duties, I would refer to secs. 424 and 435 (4) of the Municipal Act, R.S.O. ch. 223, and secs. 8 (6), 9, 42, 47, 71, 72 (1), 78, 79, 83, 84 (3), 86 (3) (6) (7) (8) (13), of the Public Schools Act, 1901, being 1 Edw. VII., ch. 39 (O.).

There is no dispute that rates are levied for the school board in question. The only question in respect to same being by what municipality are such rates levied? With considerable hesitation, I have come to the conclusion, that it makes no difference what municipality raises or levies the rates; that the words employed by the Legislature disqualify any member of the council of any municipal corporation, who was at the time of his election a member of a school board, for which rates are levied; whether levied by the municipal corporation for which he was elected, or by any other municipality, seems to me to make no difference.

As to the third objection, namely, that having been elected a school trustee, prior to the passing of the amending Act, the saving clause relieves him from disqualification.

I do not agree with this argument. The saving clause refers to the election of the member of the council of any municipal corporation, and not to the election of a school trustee. The Chief Justice of the King's Bench Division has in *Rex ex rel. Zimmerman v. Steele* (1903), 5 O.L.R. 565, considered the various objections above referred to, and I follow his judgment in the conclusions I have arrived at.

I am, therefore, of opinion that, for the reasons above set forth, the respondent was disqualified at the time of his election as county councillor in division No. 7 of the county of Ontario,

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held on the 5th January, 1903, and that the election must be set aside and a new election had.

With reference to the costs of these proceedings; they have been unnecessarily increased by reason of the relator applying to be seated in the place of the respondent. It is true, that the respondent might have disclaimed and saved further expense; but that would have given the seat to the relator, who has been found to be not entitled to same, and who did not appear to have had, at the time of the election, the confidence of a sufficient number of electors to elect him. Under the circumstances, while giving the relator the costs of the proceedings against the respondent, so far as he has succeeded, he must pay the respondent his costs in opposing the application to seat the relator: the one set of costs to be set off against the other *pro tanto*.

G. A. B.

[BOYD, C.]

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO.

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March 23.

TORONTO GENERAL TRUSTS CORPORATION.

Revenue—Succession Duties' Act—Costs of litigation.

In litigation under the Succession Duties' Act express power is given to the High Court to deal with the costs thereof; and where therefore an estate had paid, or where ready to pay, all the duties, which could properly be claimed against it, it was held entitled to the costs of opposing a claim for higher duties.

THIS was a motion asking for the direction of the Court as to the costs of an action and a special case raising the question as to the liability of the estate of Hugh Ryan, deceased, for succession duty under the Succession Duty Act. Judgment in the special case was given by BOYD, C., on December 11th, 1902, and is reported *ante* p. 216.

W. E. Middleton, for the plaintiff.

A. E. Knox, for the trustees.

J. D. Falconbridge, for the adult beneficiaries.

March 23. BOYD, C.:—In litigation under the Succession Duties Act which is remitted to the High Court, there is power expressly given to deal with the costs: 62 Vict., sess. 2, ch. 9, secs. 1 and 3 (O.) Generally such jurisdiction is conferred as is exercised by the Court in ordinary controversies between parties.

The rule of dignity which formerly prevailed that the Crown (and the Attorney-General acting for the Crown) neither asks nor pays costs, is practically superseded. In petitions of right, costs are in the discretion of the Court: Rule 934; and so in cases of convictions being quashed or affirmed: Rules of 7th June, 1902. So under the general head of "Crown actions," in cases of proceedings before any Court in Ontario by virtue of any statute relating to the public revenue, costs may be dealt with as in actions between subject and subject: Rules, 239, 240.

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The jurisdiction to give general costs in a special case, though not provided for in terms, is conceded to exist under the Imperial Act, 13 & 14 Vict. ch. 35, sec. 32, by which the costs in "special cases" are in the discretion of the Court, which is incorporated into our law by sec. 37 of the Judicature Act, R.S.O. 1897, ch. 37.

On the merits the defendants' contention prevailed: they were ready to pay or had paid all the duty which could be exacted, and the claim of the public officer for more failed. A burden is laid upon private estates by the Succession Duties Act; it should not be increased by the expense of litigation unless something exceptional has arisen. True, in this case the matter turned upon the construction of the will, and though in the case of beneficiaries, actual and potential, that is a ground for casting the costs upon the estate if the testator is accounted blameworthy by reason of the uncertainty or confusion of his testamentary expressions, yet I cannot say such was the case here. The scheme of the will was well defined, and the language was aptly used for giving effect to his instructions. I think, therefore, that costs should be paid by the unsuccessful party, but only one set of costs should be taxed to the defendants.

G. F. H.

[IN THE COURT OF APPEAL.]

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RE FAULKNER.

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April 14

Arbitration and Award—Submission—Appointment of Sole Arbitrator—Arbitration Act, R.S.O. 1897, ch. 62, sec. 8—Appeal—Order of Judge in Chambers.

A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient:"—

Held, reversing the decisions of a Divisional Court, 3 O.L.R. 93, and of STREET, J., 2 O.L.R. 301, that the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R.S.O. 1897, ch. 62, sec. 8, and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator.

Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls (1901), 2 O.L.R. 585, approved.

Held, also, that the order of STREET, J., dismissing an application to set aside the appointment of a sole arbitrator, was not made by him as *persona designata*, but was a judicial order from which an appeal lay.

AN appeal by the Employers' Liability Assurance Corporation from the decision of a Divisional Court, 3 O.L.R. 93, affirming the decision of STREET, J., 2 O.L.R. 301, dismissing the appellants' application for an order setting aside the appointment of Edward Morgan as sole arbitrator, and prohibiting him from proceeding as sole arbitrator, under the circumstances mentioned in the former reports.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 11th December, 1902.

J. H. Moss, for the appellants.

R. McKay and *H. J. Fisher*, for the Excelsior Life Insurance Company, the respondents.

April 14. The judgment of the Court was delivered by OSLER, J.A.:—A policy of insurance issued by the Employers' Liability Assurance Corporation (hereafter called "the corporation") in favour of the Excelsior Life Insurance Company (hereafter called "the company"), guaranteeing the company

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against loss which might be sustained by them through the fraud or dishonesty of one of their servants, contained, among other provisions, the following: "This agreement is entered into on the condition that, if any difference shall arise in the adjustment of a loss, the amount to be paid by the corporation shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be final."

The company, alleging that a loss had been sustained by them in consequence of the dishonesty of their servant, appointed an arbitrator on their behalf under this clause, and gave notice thereof to the corporation. Being advised that the submission was one which provided for a reference to two arbitrators, within the meaning of sec. 8 of the Arbitration Act, they further required the corporation to appoint an arbitrator on their own behalf within seven clear days following the service of such notice, failing which the company might appoint the arbitrator already named by them, to act as sole arbitrator. The corporation, contending that no difference had arisen which entitled the company to proceed to arbitration, and that, in any event, they had no power to appoint a sole arbitrator, made no appointment. The company then appointed, and gave notice to the corporation that they had appointed, the arbitrator already appointed by them, as sole arbitrator. The corporation thereupon applied to Street, J., in Chambers, under sec. 8, proviso, of the Arbitration Act, to set aside the appointment. The learned Judge refused to do so, and his order was affirmed on appeal by a Divisional Court. The corporation now, by leave, appeal to this Court against these orders.

It was contended by the respondent company that the order of Street, J., was made by him as *persona designata*, and was not subject to be reviewed by the Divisional Court, or by this Court. The short answer to this objection, however, is, that by sec. 3 of the Arbitration Act, a submission, *i.e.*, a written agreement to submit present or future differences to arbitration, has the same effect in all respects as if it had been made a rule of Court; *sc.*, the High Court of Justice. When, therefore, a Judge in Chambers entertains an application to set aside an

appointment of a sole arbitrator under such a submission, he is not exercising a personal and independent jurisdiction, but is acting as, or for, the Court, exercising the powers of the Court, and dealing with a matter of which the Court is, by statute, already seised, just as he does in exercising many of the other powers which the Act confers upon the Court or a Judge in reference to a voluntary submission, *e.g.*, enlarging the time for making the award (sec. 10); remitting the matters back for the reconsideration of the arbitrators (sec. 11). Under the corresponding provisions of the earlier Act, R.S.O. 1887, ch. 50, sec. 216, before making an application to revoke the appointment of a sole arbitrator, it was necessary, in order to confer jurisdiction, to make the submission a rule of Court, which was done as a matter of course, unless it appeared therefrom that the parties had agreed to the contrary. The present Act dispenses with this formal proceeding, and regards the submission as in Court *ab initio* for the purpose of any motion respecting it: *In re Allen* (1871), 31 U.C.R. 458, 488; and *In re Waldie and Village of Burlington* (1886), 13 A.R. 104, 112, may also be referred to.

What we have to deal with, therefore, is a judicial order, which is appealable under the proper conditions.

The question is, whether the submission is one providing for a reference to two arbitrators, within the meaning of sec. 8 of the Arbitration Act, which enacts that, "Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention," the arbitrator appointed by one party, may, on the default of the other party to appoint one, be appointed to act as sole arbitrator in the reference. In such a submission, a provision is implied, unless a contrary intention is expressed therein, that the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award: sched. A (b).

Those, therefore, who become parties to it, do so with the knowledge that, if the arbitrators are appointed, the award will not necessarily be made by them, but may, if they do not agree, be made by an umpire; and also that, if either fails to appoint his arbitrator, the award may be made by a single arbitrator.

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The Legislature is dealing with the contract of the parties, and attaches to it the terms and consequences I have mentioned, unless a contrary intention is expressed. If the contract they have made is not that which the section deals with, but a different one, it cannot apply. The submission before us is, no doubt, a submission to two arbitrators. But it is something more. Clearly the two arbitrators could not have appointed an umpire. That power, which would otherwise have been implied, is excluded by the language of the submission, which expresses a contrary intention, viz., the intention of the parties not to submit to the award of an umpire.

Equally clear, as I venture to think, is the expression of their intention that the only award by which they are to be bound is one made by two arbitrators, either the two to be appointed by them, or, if they are unable to agree, not by an umpire, but by one of the appointed arbitrators and a third arbitrator to be chosen by the two. By the very terms of their agreement, they have excluded the operation of sec. 8, sub-sec. (b), of the Act, inasmuch as the appointment of a sole arbitrator is not consistent with an agreement which contemplates and provides for an award by two or by two out of three.

It was argued very forcibly by Mr. McKay that if you stopped at the end of the first clause, there was a reference to two arbitrators *simpliciter*, and that one of the parties had the right to apply the statute if his opponent attempted to defeat the submission by making no appointment. But I know of no authority for thus severing what is one entire agreement. It is the right of the parties to enter into such an agreement as will exclude the statute, and when the whole of their agreement in this case is read, the "contrary intention" the Act refers to is seen, namely, that sec. 8 (b) is not to apply, and that the award is to be made, if made at all, by two arbitrators, and not by a sole arbitrator, or an umpire.

Whether the third arbitrator was to be appointed after the other two had failed to agree, or, as I should suppose the proper course, before they entered upon the reference, seems to me a matter of little moment. The submission may not be couched in the usual terms of a submission to three arbitrators, but neither is it what may be called the statutory submission

to two arbitrators; and, unless it is, I do not see that either party has the right to appoint his arbitrator the sole arbitrator.

It is asked in the judgment below, why such a submission as we have before us is not quite as much within sec. 8 as is a submission to two arbitrators with power to appoint an umpire; or to two arbitrators simply, saying nothing about an umpire. To which, with deference, I can only answer that the two agreements are entirely different, or seem to me to be so. In one case the parties know that they are entering into a submission under which an award may be made by an umpire; or by what may be described as a statutory tribunal consisting of a sole arbitrator—the arbitrator appointed by one of the parties. In the other, they provide, as they are at liberty to do, for an award by two arbitrators, and exclude the contingencies which may arise and are provided for by the simpler form of submission. The statute, perhaps unfortunately, does not provide for an attempt by one of the parties to such a reference to defeat it by refusing to appoint an arbitrator; but, whatever remedy the disappointed party may have for breach of contract, I think he had no right to appoint a sole arbitrator, as if the Act applied to such a reference.

I agree with the opinion of my brother MacMahon in the Court below, and with the judgment of the Chancellor in *Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls* (1901), 2 O.L.R. 585, rather than with that of the Divisional Court; and would, therefore, allow the appeal.

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[DIVISIONAL COURT.]

D. C.

KAVANAUGH V. CASSIDY.

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Jan. 13.
Feb. 18.
April 7.

Costs—Security for Costs—Residence Out of Ontario—Con. Rule 1198 (b).

A man of about thirty-six years of age who had since childhood lived in the United States came to Toronto in October, 1902, to inspect for his employers, brokers in New York, a branch office in Toronto. He was then instructed by his employers to act as telegraph operator in the Toronto office. These brokers gave up business in a few weeks and he then was employed as a telegraph operator by their successors. The business of the successors also came to an end within a few weeks, and in connection with the business the plaintiff was accused by the defendant of fraud and arrested, this action for damages being brought in consequence thereof. He was an unmarried man and had been in the habit of living with his mother in Kansas City when out of employment, and he stated on cross-examination that he would return to the United States if he could find employment there :—

Held, that under these circumstances the defendant was entitled to security for costs of the action.

A MOTION by the defendant for security for costs was argued before Mr. Winchester, the Master in Chambers, on the 8th of January, 1903.

J. Edwin Cook, for the defendant.

S. B. Woods, for the plaintiff.

January 13. THE MASTER IN CHAMBERS:—Action for false arrest and malicious prosecution. The defendant moves for an order for security on the ground that the plaintiff is ordinarily resident out of the jurisdiction of this Court, and only temporarily resident within it. The so-called false arrest was made in connection with some transaction in the purchase of stocks, whereby the defendant having lost a considerable sum of money, and accusing the plaintiff and one Tucker with having defrauded him out of same, had the plaintiff arrested.

It appears from the evidence on this application that the plaintiff is a telegraph operator, and has for some years been operating on wires in connection with different brokers' businesses. When about two or three years of age his family removed from Ontario to the United States, where he has remained ever since. He is now thirty-six years of age or upwards. His mother and sister are still living in the States, and when out of employment, and at other times, he makes his

home with them. He is unmarried, and possesses no property other than what he carries about with him from place to place. In July last he left Kansas City, where his mother and sister reside, and went to New York to take employment with McDermott, Evans & Lee, stockbrokers, of that city. In September last he was sent by them to Toronto to inspect their branch office here, expecting that it would be but a temporary visit, but after a week or so he received instructions to remain here in their office. They, however, were compelled to withdraw their office from Toronto, and what is called the American Stock and Grain Company took possession of the wire which they had, and retained the plaintiff in their service. They have also withdrawn, and the plaintiff is at present out of employment. His examination on his affidavit, taken in connection with the other evidence, does not give one any assurance that he is a permanent resident of Ontario. In my opinion, all the evidence shews that he is only temporarily resident in Ontario, while ordinarily resident in the United States. He states that he has voted for the President of the United States on at least two occasions, yet he does not know whether he is an American citizen or not. His past life seems to be one of constant change from place to place, although Kansas City has been made his headquarters. His evidence would seem to indicate that he will not remain in Toronto unless satisfactorily employed. He has no such employment at present, and his evidence as to obtaining such, in the face of the other evidence, is, to say the least, not very satisfactory.

The language of Moss, J.A., in *Allcroft v. Morrison* (1899), 19 P.R. 59, at p. 65, applies to the facts elicited in this case. He says: "The important inquiry is not *where* the plaintiff resides out of Ontario, but whether he is a person ordinarily resident *out* of Ontario. If he is, it is of no consequence where he resides, or whether he has or has not a fixed place of abode elsewhere."

Following the decision in that case, the order for security will issue in the usual form. Costs in the cause.

An appeal from this order was argued by the same counsel before BRITTON, J., in Chambers, on the 6th of February, 1903.

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February 18. BRITTON, J.:—The learned Master thought this a proper case in which, under Rule 1198 (b), to order the plaintiff, as a person “ordinarily resident out of Ontario,” to give security for costs, and he did so because he thought this case not distinguishable on the facts from *Allcroft v. Morrison*, 19 P.R. 59.

In *Michiels v. Empire Palace, Limited* (1892), 66 L.T.N.S. 132, referred to and discussed in *Allcroft v. Morrison*, at p. 65, Lindley, L.J., said that the rule (the same as that now under consideration) was purposely made vague and elastic for anything short of a man actually living in England might be a temporary residence, and he expressed the opinion that the real object of the rule was to cover a case in which a foreigner, ordinarily resident out of the jurisdiction, would not be here when he was wanted.

Applying that interpretation, I think the plaintiff’s residence in Ontario, as shewn by the material before me, is not merely temporary—is certainly not for the purpose of bringing an action—and there is no reason to apprehend that he will not be here when wanted.

Moss, J.A., in *Allcroft v. Morrison*, at p. 66, says: “Sub-section (b) must be read in connection with sub-section (a). So read, it conveys the idea of residence out of Ontario, in the usual sense of the term, coupled with abiding within Ontario for a temporary period or a temporary purpose.”

There is no doubt that the plaintiff, up to September last, was not only ordinarily but altogether, since childhood, resident out of Ontario; but upon the affidavit and the very long cross-examination of the plaintiff, my conclusion is that he does not come within the class intended by the rule, as those “temporarily resident within Ontario.”

The plaintiff came to Toronto in September, 1902, under special employment, and for what might fairly be called a temporary purpose. His relations with his then employers are changed. He is in Ontario, resident here, with no home or employment or business connection, or property of any kind out of Ontario. He is an unmarried man, and seems to have no one depending upon him for support. Since coming here to reside, the present alleged cause of action arose in Ontario.

That the plaintiff would be willing to accept a good situation and return to the United States, if opportunity offered, is not material for the determination of the question on this application.

The plaintiff is entitled to prosecute this action without being compelled to give security for costs. If the defendant succeeds, it may be a hardship upon him, but not more so than upon many a successful litigant, where the opposite party is not possessed of means from which costs can be realized.

Appeal allowed; order for security set aside. Costs to be costs in the cause to the plaintiff.

This is without prejudice to any application for security, if, pending the action, the plaintiff goes to reside out of Ontario.

An appeal by the defendant was argued before a Divisional Court [BOYD, C., MACLAREN, J.A., and FERGUSON, J.] on the 6th of April, 1903.

The same counsel appeared.

April 7. The judgment of the Court was delivered by BOYD, C.:—I think the judgment of the Master in this case was one that ought not to have been disturbed, and that it should now be restored. Rule 1198 governs as to the law, and the affidavits and evidence supply the facts. It appears to me indisputable that this plaintiff is a person ordinarily resident out of Ontario. He is thirty-six years of age, has for thirty-four years, prior to the end of last September, lived in the United States, where he followed business pursuits, and where his relatives live, with whom he was accustomed to make his home.

For about six months he has been in Ontario, engaged in American stock-broking agencies, which have passed into different shapes almost monthly. He is now, and was when the order was made, in no settled business, and was expecting something that might turn up which would keep him in this city and country. He declines to state under oath how long he will be here, and my conclusion is that he is merely a transient visitor, who may leave the country at any moment for his place of usual residence.

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The security should be given as directed by the Master; and costs of appeal, and other costs connected with the application, costs in cause to defendant.

R. S. C.

[BOYD, C.]

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McMAHON v. COYLE.

March 24.

Landlord and Tenant—Lease—Short Forms Act—Covenant not to Assign—Breach—Right of Entry.

The right of re-entry under the Act respecting Short Forms of Lease applies to the breach of a negative as well as of an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sublet without leave.

Toronto General Hospital v. Denham (1880), 31 C.P. 207, followed.

The making of an agreement for the assignment of a lease, the settlement of the terms thereof and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant; the fact of the document, showing the transfer not having been made until after action brought is immaterial.

THIS was an action tried before BOYD, C., at Belleville, on the 13th March, 1903.

The plaintiff, Sarah A. McMahon, leased to the defendant, Daniel Coyle, the premises in the city of Belleville, known as the Anglo-American Hotel, by an indenture of lease made under the Short Forms Act, for a period of ten years from the 22nd April, 1899, at an annual rental of \$1,050. Subsequently, on the 19th of November, 1902, the defendant Coyle sold the business to the defendant, W. P. Lewis, and executed an agreement to assign the lease for the unexpired term, and to transfer the business by a proper conveyance. This was carried out on the 24th November, on which day the plaintiff ascertained the facts, and demanded possession of the property for breach of the covenant in the lease not to assign or sublet without leave.

The defendants refused to give up possession, or to make a new arrangement with the plaintiff, who then brought an action to recover possession, and for damages for detention of the property.

The defence raised was that in the month of August, 1902, after the defendant Coyle had advertised his business for some months, he had obtained the verbal consent and license of the plaintiff to his disposing of the business and assigning the lease. This the plaintiff denied. The question whether the consent was given or not was left to the jury, who found in favour of the plaintiff for \$344.50.

The question was also raised that the covenant in the lease not to assign or sublet was a negative covenant, and that the right of re-entry provided for by the lease only had application to affirmative covenants, and the covenant not to assign being a negative one, that the plaintiff could not recover.

E. G. Porter, for the plaintiff.

R. C. Clute, K.C., and *W. S. Morden*, for the defendants.

The Chancellor reserved his decision, and subsequently delivered the following judgment.

March 24. *BOYD, C.*:—The jury have found that there was no consent of the plaintiff to the transfer of the lease from Coyle to his co-defendants; but it is argued that the right to re-enter applies only to the breach of an affirmative covenant, but not that of a negative covenant, *i.e.*, one not to do a particular act. The cases relied on give the right of re-entry in case of failure to perform the covenant. Here, under the short form lease, the statutory right of re-entry is "in case of breach of non-performance of any of the contracts or agreements" therein contained, of which one is not to sublet without leave.

As held by *Wilson, C.J.*, in *Toronto Hospital Trustees v. Denham* (1880), 31 C.P. 207, it applies to acts as well of omission as of commission, and extends therefore to the assignment without license.

There has been a plain breach of the covenant not to assign without leave, and the right to re-enter follows: *Eastern Telegraph Co. v. Dent* (1899), 1 Q.B. 835.

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It is immaterial that the document shewing the transfer was not executed till after action brought. The agreement was made, all terms settled, and transfer of the premises given by the tenant to his co-defendant before the writ was issued, and that is sufficient evidence of breach.

Having regard to the fact that the defendants will have to pay the costs of litigation, I am not disposed to assess the damages at a greater rate than the current rent of \$1,000.

Judgment for possession; payment of \$344.50, and costs of action by the defendants.

G. F. H.

[IN CHAMBERS.]

O'FLYNN V. MIDDLETON.

1903

March 31.

Lien—Costs—Lands Subject to Action—Registry of Lis Pendens—Discharge of.

Con. Rule 1129, which empowers a Court or a Judge to declare that a solicitor, who has been employed to prosecute or defend any case, etc., shall have a lien on the property recovered or preserved through his instrumentality is to be construed liberally, so as not to deprive the solicitor of his lien.

A *lis pendens* registered by a solicitor against land, the subject matter of a redemption action, wherein costs were incurred by the solicitor will not be discharged on a motion therefor in Chambers, but will be left for the decision for the trial Judge after the hearing of the evidence.

THIS was a motion by the defendant for an order to remove and discharge the registry of a certificate of *lis pendens*, on the ground that the plaintiff was not entitled to register one in the action, which was brought to recover the amount of a bill of costs in a redemption action, and to establish a lien on the land for the amount thereof. The motion was heard on the 26th of March, 1903, before Mr. Winchester, the Master in Chambers.

C. A. Moss, for the defendant.

E. E. A. DuVernet, for the plaintiff.

MARCH 31. THE MASTER IN CHAMBERS:—This action is brought to recover the amount of a bill of costs claimed to be due by defendant to plaintiff, and for a lien for the amount of same on certain lands of the defendant described in the indorsement of the writ of summons. A *lis pendens* has been registered against the lands so described.

The defendant moves for an order removing and discharging the certificate of *lis pendens* on the ground that this is not a case in which the plaintiff is entitled to one.

The material filed on the motion shews an unfortunate condition of affairs, as a result of litigating as to a trifling amount in dispute.

It was admitted by counsel for the plaintiff on the argument that he could not hope, under the decisions, to retain the *lis pendens* as against all the lands described in it, but contends that as to twenty-five acres the plaintiff has a lien, and is under

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Con. Rule 1129 entitled to a charging order for the amount of his costs sued for herein.

That rule provides that "Where a solicitor has been employed to prosecute or defend any cause, matter or proceeding, it shall be lawful for the Court in which the cause, matter or proceeding has been heard or is pending, or for a Judge thereof, to declare such a solicitor, or his personal representatives to be entitled to a charge upon the property of whatever nature, tenure or kind, recovered or preserved through the instrumentality of such solicitor; . . ."

The action is being defended, and a counterclaim has been made against the plaintiff, so that all the facts referred to in the affidavits filed on this motion will be brought out before the trial Judge. It was never intended that on such an application as the present that the questions in dispute and to be tried should be disposed of.

As to whether the plaintiff is entitled to a lien or not on the twenty-five acres is a question for the trial Judge after the whole evidence has been adduced. Whether a solicitor has a lien or is entitled to a charge against the land in a redemption action will then be decided.

I would refer to *Scholefield v. Lockwood* (1868), L. R. 7, Eq. 83. That was a case of redemption and foreclosure, where the client was permitted to redeem a certain property upon payment to the plaintiff of a sum mentioned; he becoming bankrupt, his solicitors presented a petition to the Court praying for a declaration that they were entitled to a charge for the amount of their taxed costs upon all the estate or interest of the client or his assignee in bankruptcy in the mortgaged premises.

Lord Romilly, M.R., said at p. 87: "I have looked at this petition very carefully and I think it comes within the Act. The words of the Act are 'recovered or preserved.' This interest is clearly not 'recovered,' but I think it may fairly be said to be 'preserved.' I think the Act is intended to be construed liberally, and solicitors ought not to be deprived of their lien in these matters where there has been a good deal of work done. If there is nothing coming to him the lien will amount to nothing. I therefore make the order as prayed."

See also *Bailey v. Birchall* (1865), 2 H. & M. 371.

The order will go setting aside the certificate of *lis pendens* so far as it affects the defendant's land, other than the twenty-five acres, which was the subject of the redemption action. The action should proceed to trial at the first sittings.

Costs in the cause to the defendant.

G. F. H.

M. A. C. R. in
Chambers.

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[IN CHAMBERS.]

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REX v. FOSTER.

April 8.

Criminal Law—Conviction under Ontario Liquor Act, 1902—Removal of Proceedings by Certiorari—Subsequent Issue of Commitment—Invalidity—Amendment—Application of Statute Relating to Justices of the Peace—Irrregularities—Name of Informant—Name of Defendant—Sentence—Adjudication—Fine.

The defendant was convicted on the 3rd February, 1903, before a Judge designated under sec. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and to pay a penalty of \$400. On the same day a warrant was issued by the Judge, committing the defendant to gaol in pursuance of the conviction, and under this warrant he was arrested and lodged in gaol. On the 30th January, 1903, a writ of certiorari was issued to the Judge and a county Crown attorney, commanding them to send to the High Court of Justice all summonses, proceedings, etc., had before the Judge against the defendant and two others. This was served on the Judge on the 2nd February, before the date of the conviction and before the issue of the warrant:—

Held, that the proceedings against the defendant were removed from the court below by the issue and service of the certiorari, and that the subsequent proceedings were void.

By 2 Edw. VII. ch. 12, sec. 15 (O.), the provisions of the Criminal Code respecting amendment of proceedings before justices of the peace are made applicable to all cases of prosecutions under Provincial Acts:—

Held, not to apply to proceedings under the Liquor Act, 1902.

Semble, that in a conviction of this kind it was no objection, on habeas corpus that the name of the informant did not appear, nor that the prisoner was prosecuted under the name of "Foster," whereas his name was "Forster."

Semble, also, that there was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings; but, at all events, there was no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable.

THE defendant was imprisoned in the common gaol of the county of Elgin under a warrant of commitment, dated 3rd February, 1903, issued by Archibald Bell, Judge of the county court of the county of Kent, which recited that the said Judge had been designated by the President of the High Court of Justice to conduct the trial of the accused, Robert Foster, under the provisions of the Liquor Act, 1902, and the Ontario Election Act, and amendments thereto; that the Judge had issued a summons against the accused (setting it out) to appear before the Judge at St. Thomas on the 29th December, 1902; that on that day the accused appeared by counsel, though not in person; that the trial of the accused upon the said charge was adjourned, and was proceeded with in the presence of his counsel, but in

his absence, on the 19th day of January, 1903, on which day the Judge found the accused guilty of the offence charged, and deferred sentencing him until the 3rd February, 1903 (the date of the warrant); that upon that day, the accused not appearing to receive sentence, the Judge did, notwithstanding the absence of the accused, pass sentence upon him for his said offence as follows, namely, "that he, the said Robert Foster, do pay a penalty of \$400, and that, in addition thereto, he be imprisoned in the common gaol of the county of Elgin for the period of one year without hard labour, and that he be then discharged." The warrant then went on to command the peace officers of the county of Elgin to take the defendant and deliver him to the keeper of the common gaol at St. Thomas, and the keeper of the gaol to receive the defendant into his custody in the gaol and there to imprison him for one year without hard labour and until he should have suffered the imprisonment for which he was sentenced.

The defendant moved, upon the return of a writ of *habeas corpus*, and upon notice to the Attorney-General, for an order for the discharge of the defendant from custody under this commitment, upon grounds which appear in the argument and judgment.

The motion was heard by STREET, J., in Chambers, on the 6th April, 1903.

J. W. McCullough, for the defendant. The warrant of commitment is bad because issued after service of a writ of certiorari to remove the conviction upon which the warrant was founded: Paley on Convictions, 7th ed., p. 367; *Regina v. Zickrick* (1897), 11 Man. L.R. 452. 2. The commitment is bad because the defendant was tried, sentenced, convicted, and committed under the name of Foster, his true name being Forster: *Hoye v. Bush* (1840), 1 M. & G. 775; *McDonald v. Rodger* (1862), 9 Gr. 75. 3. The conviction is invalid to sustain the commitment because it contains no adjudication and no forfeiture: *Rex v. Vipont* (1761), 2 Burr. 1163; *Regina v. Newton* (1886), 11 P.R. 98; *Regina v. Cyr* (1887), 12 P.R. 24. 4. The name of the informant is not stated: *Hennesy v. Ossier* (1862), 8 U.C.L.J.O.S. 299.

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J. R. Cartwright, K. C., for the Crown. If necessary, the motion should be enlarged to allow a new warrant of commitment to be issued: *Regina v. Lavin* (1888), 12 P.R. 642; sec. 15 of the Statute Law Amendment Act, 2 Edw. VII. ch. 12 (O.) "Forster" and "Foster" are *idem sonans*: *Earl of Bedford v. Forster* (1603), Cro. Jac. 77.

April 8. STREET, J.:—The prisoner was convicted on 3rd February, 1903, before A. Bell, Esq., County Judge of the county of Kent, under sec. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year in the common gaol of the county of Elgin, and to pay a penalty of \$400. On 3rd February, 1903, being the date of the conviction, a warrant was issued under the hand and seal of Judge Bell for committing the defendant to gaol in pursuance of the conviction, and under this warrant he was arrested and is now in gaol, having waived personal production in Court under the *habeas corpus*.

On the 30th January, 1903, upon the application of the prisoner, a writ of certiorari was issued directed to Judge Bell and to the county Crown attorney for Elgin, to return certain papers into the High Court, and this was served on them on 2nd February, 1903. The writ has been produced with a number of papers annexed to it, but these are not in any way identified, nor is there any return to the writ signed by either of the parties to whom it is directed.

The writ of certiorari is headed: "A proceeding before His Honour Archibald Bell, Judge of the county court of the county of Kent, intituled in the matter of the prosecution of Henry Branton, Robert Foster, and William Walsh, for offences against the provisions of the Ontario Election Act and the Liquor Act, 1902:" the direction to Archibald Bell, Esq., county Judge of the county of Kent, and D. J. Donahue, county Crown attorney for the county of Elgin, follows: the writ then proceeds: "We being willing for certain causes to be certified of certain convictions and proceedings had before you Archibald Bell as a Judge designated under the Liquor Act, 1902, to try certain offences thereunder as such designated Judge under the Liquor Act of 1902, against Robert Foster, William Walsh, and Henry

Branton, on the affidavit and complaint of D. J. Donahue, county Crown attorney for the county of Elgin, command you that you send us in our High Court of Justice at Toronto forthwith on the receipt hereof all and singular the summonses, depositions, evidence, conviction, orders, and proceedings aforesaid," etc.

The grounds upon which the discharge of the defendant from custody was urged before me were the following:

1. That the warrant of commitment was issued after the issue of a writ of certiorari removing the proceedings into the High Court.

2. That the prisoner was tried and convicted under the name of Foster, whereas his true name is Forster.

3. That the conviction is bad in that it does not declare the destination of the fine and forfeit it to the Crown and the informer.

4. That no informant is named.

The whole proceedings here on both sides have been very loosely conducted, and I have had some doubt as to whether the proceedings covered by the writ of certiorari were not limited to a joint proceeding against the three persons named in it, Branton, Walsh, and Foster; but the words in the body of the writ seem sufficient to cover the separate proceedings against these men, and I think it must be held, therefore, that the proceedings against Robert Foster were removed from the Court below by the certiorari issued on the 30th January, 1903, and served on Judge Bell on the 2nd February, 1903, and that the subsequent proceedings taken before him were void.

The Act referred to by Mr. Cartwright of 2 Edw. VII. ch. 12, sec. 15 (O.), making the provisions of the Code respecting amendment of proceedings before justices of the peace applicable to all cases of prosecutions under Provincial Acts, appears to me to be intended to apply only to summary proceedings before justices of the peace and not to proceedings under the Liquor Act of 1902. But, even if it did, I do not see how it would help the matter here.

I should not have considered the other objections taken to the proceedings entitled to any weight. The proceedings under the Liquor Act, 1902, are not of the same character as those

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before justices of the peace, whose convictions during centuries of decisions have become subject to highly technical rules founded upon considerations no longer in many cases existing. The name of the informant appears on the present proceedings, and the prisoner has been prosecuted under a name so nearly identical in sound with that which he now claims to possess, that effect should not be given to the absence of the letter "r" in the proceedings against him, especially as he has appeared by counsel and defended under the name under which he has been prosecuted.

I think there was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings. But, at all events, I see no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. This would not be so in a *conviction* before a magistrate because of a long established rule to that effect, but it is otherwise in the *order* of a magistrate: see Paley, 7th ed., p. 170; and I am not here bound by the decisions relating to convictions before magistrates, and am at liberty to apply a reasonable interpretation to the proceedings: see also *Lindsay v. Leigh* (1848), 11 Q.B. 455.

But, as there appears to have been no authority in the Court below to issue the commitment under which the prisoner is held, after the proceedings before it had been removed by certiorari, there must be an order for his discharge from custody.

No costs.

E. B. B.

•[DIVISIONAL COURT.]

BERRY V. DAYS.

Restraint of Trade—Severable Covenant—Waiver—Assignability.

D. C.

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April 18.

Defendant covenanted with the plaintiff that he would not "directly or indirectly engage in the drug business" in a certain village "or within a radius of ten miles therefrom during a term of five years from this date" . . . and that he would not "open or have part in a third or further drug store in" (said village) "during a term of ten years from this date." The plaintiff, B. sold his share in the business to the defendant and actively promoted a partnership between him and his (plaintiff's) son, which was continued for some months when the defendant sold out to the son. The plaintiff afterwards acquired the business and sold it by bill of sale, reciting the covenant and extended its benefit to the purchaser and covenanted with him to save him harmless from a breach of the covenant by the defendant :—

Held, that for the first five years there were two concurrent severable covenants and that while the plaintiff might by his conduct have waived a breach of the first not to enter into business during the five years he had not waived any breach of the second not to open or have part in a third drug store :—

Held, also, that the covenant was assignable and that the right to enforce it did not terminate by reason of the plaintiff having gone out of business.

THIS was an appeal by the defendant from the judgment in an action for an injunction to restrain the breach of a covenant.

The action was tried at Goderich, on the 19th of November, 1902, before MACMAHON, J., in whose judgment the facts are stated.

Proudfoot, K.C., and P. A. Malcomson, for plaintiffs.

H. Morrison, for defendant.

December 12. MACMAHON, J.:—Action to recover damages for an alleged breach by the defendant of a covenant contained in an agreement entered into with the plaintiff and his son, John F. E. Berry, by which he (defendant) covenanted not to enter into business as a druggist, and not to open a third or further drug store in the village of Lucknow; and for an injunction to restrain the defendant from opening and carrying on a third or further drug store in said village.

The plaintiff was the owner of a store in Lucknow, which for many years had been rented by him to the defendant, and used as a drug store; and on the 21st September, 1900, while

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engaged in carrying on the business of a druggist in said store, the defendant sold the business and his stock of drugs to the plaintiff and his son, John F. E. Berry, for the expressed consideration of \$3,200, and executed a bill of sale thereof to them, in which he (defendant) covenanted that he would not "directly, or indirectly, engage in the drug business in said village of Lucknow, or within a radius of ten miles therefrom, during a term of five years from this date: and that he will not open or have part in a third or further drug store in said village of Lucknow during a term of ten years from this date."

At the time of the execution of the bill of sale, there were two drug stores being carried on in Lucknow, the one owned by the plaintiff George W. Berry, and another.

The plaintiff actively promoted the formation of a partnership between the defendant and his (plaintiff's) son, John F. E. Berry, and a partnership was entered into between them on the 26th January, 1901, to carry on the business of druggists on said premises under the style of "Days & Berry." The defendant paid to the plaintiff \$1,750 for his interest in the business.

The defendant remained in the partnership business until the 31st July, 1901, when he sold his interest therein to his partner, John F. E. Berry.

The plaintiff afterwards became the sole owner of the business, and on the 26th November, 1901, he sold to John Wood the good-will, stock-in-trade, fixtures and effects of the said druggist's business carried on by him, as a going concern.

In the bill of sale to Wood, it is recited that the business was formerly carried on by one Harry Days, and the covenants entered into by Harry Days with the plaintiff not to carry on the business of a druggist is also recited, and the benefit of the said covenants is thereby extended to the purchaser; and the plaintiff covenants to save Wood harmless from and against a breach of said covenant by Harry Days.

It was admitted that the defendant had, on the 6th of November, 1902, opened a third or further drug store in Lucknow, and is carrying on the same in his own name.

There are, I think, two distinct covenants on the part of the defendant in the bill of sale: (1) that he will not directly

or indirectly enter into or engage in the drug business in Lucknow, or within a radius of ten miles therefrom, during a term of five years from the date of the bill of sale; (2) that he will not open or have part in a third or further drug store in said village during a term of ten years from such date.

The plaintiff, by permitting the defendant to enter into and engage in a drug business already existing in Lucknow, waived a breach of the first covenant. He was content to waive a breach of that covenant because that might prove of benefit to him. That, however, was not a waiver of a breach of the other covenant entered into by the defendant, not to open or have part in a third or further drug store, which might prove a great detriment to the plaintiff or his assignee: see *Benwell v. Inns* (1857), 24 Beav. 307; *Parnell v. Dean* (1900), 31 O.R. 517; and *Roper v. Hopkins* (1898), 29 O.R. 580.

The defendant must be enjoined from having any part or interest in any third or further drug store in the village of Lucknow, during the remaining period of ten years. There will be a reference to the Master at Goderich as to the damages sustained by the plaintiff.

The defendant must pay the costs of the action and the reference.

From this judgment the defendant appealed, and the appeal was argued on the 12th of February, 1903, before a Divisional Court composed of FALCONBRIDGE, C. J. K. B., STREET, and BRITTON, JJ.

Proudfoot, K. C., for the plaintiffs, took the objection, that notice of appeal to the Court of Appeal had been given, and later a notice of appeal to the Divisional Court substituted. The case proceeded at first subject to the objection, which was subsequently overruled, the Court holding that a notice of appeal to one Court could be withdrawn, and another to a different Court substituted, if in time.

John A. Paterson, K. C., for the appeal. At the time of the issue of the writ, Berry had no sufficient interest to support an action, as he had assigned all his interest: *Roper v. Hopkins*, 29 O.R. 580, at p. 585. Then the question arises, was the covenant assignable? It was not made to his assigns, and was

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a personal matter with him: *Parnell v. Dean*, 31 O.R. 517. Wood had no right to sue; he did not acquire any interest: *Benwell v. Inns*, 24 Beav. 307; *British Canadian Loan Co. v. Tear* (1893), 23 O.R. 664; *Re Gilchrist and Island* (1886), 11 O.R. 537. The covenant was extinguished by the conduct of the parties: Leake on Contracts, 4th ed., pp. 560, 561. There was no reservation of rights, and once gone, it is gone altogether: *Patmore v. Colburn* (1834), 1 C. M. & R. 65; *Sanderson v. Graves* (1875), L. R. 10 Ex. 234; Lawson on Contracts, sec. 397; *De Bernardy v. Harding* (1853), 8 Ex. 822; *Harrison v. Polar Star Lodge, No. 652* (1886), 116 Ill. 279.

Proudfoot, K.C., contra. The fact that Berry assigned the covenant did not deprive him of the right to bring this action, because in the assignment he expressly covenanted with the purchaser to protect him, and see that the covenant was enforced. This is of no importance, as the purchaser is one of the plaintiffs, and he can maintain the action: *Boddington v. Castelli* (1853), 1 E. & B. 879; *Parnell v. Dean*, 31 O.R. 517; *Roper v. Hopkins*, 29 O.R. 580. Such a covenant as the one in question is assignable, even if assigns are not mentioned: *Jacoby v. Whitmore* (1883), 49 L.T.N.S. 335; *Showell v. Winkup* (1889), 60 L. T. R. 389; *Hitchcock v. Coker* (1837), 6 A. & E. 438; *Rolfe v. Rolfe* (1846), 15 Sim. 88; Matthews' Covenants in Restraint of Trade, p. 226; Kerr on Injunctions, Bl. ed., p. 448. The death or discontinuance from business of the covenantee does not release the covenanting party from the obligations of the covenant: *Elves v. Crofts* (1850), 10 C. B. 241; *Hastings v. Whitley* (1848), 2 Exch. 611, at p. 615. An agreement in restraint of trade is divisible if one part is bad the good part can be enforced: *Price v. Green* (1845), 13 M. & W. 695; (1847), 16 M. & W. 346; *Benwell v. Inns*, 24 Beav. 307; *Maxim, Nordenfeldt Guns and Ammunition Co. v. Nordenfeldt*, [1893] 1 Ch. 630, at p. 650; *Davies v. Davies* (1887), 36 Ch. D. 359, at p. 394; *Palmer v. Mallet* (1887), 36 Ch. D. 411; *Mallan v. May* (1843), 11 M. & W. 653. The fact that the plaintiff (Berry) allowed the defendant to carry on business did not waive his right to enforce the other portion of the covenant: *Mitchell v. Steward* (1866), L. R. 1 Eq. 541; *Richards v.*

Revitt (1877), 7 Ch. D. 224; *German v. Chapman* (1877), 7 Ch. D. 271, at p. 279.

Paterson, in reply.

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April 18. The judgment of the Court was delivered by STREET, J.:—The grounds of appeal were:—

1st. That the right to enforce the covenant had been put an end to forever by the action of the plaintiff, George W. Berry, in consenting to the defendant's carrying on business with the plaintiff's son, John F. E. Berry, on 26th January, 1901, contrary to the terms of the covenant.

2nd. That the covenant was not severable nor assignable, and that the covenantee, George W. Berry, having sold out his business to his co-plaintiff, John Wood, could not enforce the covenant, nor could the said John Wood.

In my opinion the judgment appealed against is right, and should not be disturbed.

It is necessary, in construing the defendant's covenant, to bear in mind the circumstances under which it was made.

The defendant was selling out to the plaintiff, Berry, one of the only two drug stores in Lucknow: it was considered necessary that he should not for five years either open a new drug store, or go into business with the other existing one. After five years he might go into business with the other existing one, or buy it out, but he must not for a further period of five years open a new one, so as to increase the competition in Lucknow.

There were, therefore, for the first five years two concurrent covenants, one of which continued beyond the five years for a further period of five years.

The defendant says that because the plaintiff Berry assented to his carrying on the original business with Berry's son during the first five years, that therefore both covenants are gone: but it is plain that what was assented to would have been, without such assent, no breach of the covenant not to open a third business in Lucknow, and that, therefore, the assent does not affect that covenant at all.

It would be absurd to say that the defendant could now carry on the third business until the end of the first five years,

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because Berry has waived his right to object during that period, but that Berry could shut up the defendant's shop as soon as the first five years were over, and yet that would be the result of holding that the covenant not to open a third shop only comes into force at the end of the first five years.

In my opinion, therefore, the covenant is easily separable into two parts, and one part may survive the other. It is well settled that a covenant such as this is assignable, and that the right to enforce it does not terminate by reason of the plaintiff having gone out of business himself: *Hitchcock v. Coker*, 6 A. & E. 438; *Elves v. Crofts*, 10 C.B. 241; *Jacoby v. Whitmore*, 49 L.T.N.S. 335.

The judgment should, therefore, stand, and the defendant should be restrained from opening, carrying on, or having part in a third or further business in Lucknow during the period of ten years, from 21st September, 1900. The plaintiffs, at the opening of the trial, appear to have disclaimed the desire to recover damages, and as no evidence was offered of any, and it would be extremely difficult to prove or to estimate such damages, I think there need be no reference.

The defendant must pay the costs of the action and of the present appeal.

G. A. B.

[DIVISIONAL COURT.]

HUNSBERRY,

PRIMARY CREDITOR,

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March 4.

KRATZ,

PRIMARY DEBTOR,

AND

RITTENHOUSE, ET AL., GARNISHEES.

Attachment of Debts—Interest of Residuary Legatee.

A primary creditor in a division court, by garnishee summons served on the executors, attached the interest of a residuary legatee in the estate of a testator, who had died within a year of the attachment. A receiver was subsequently appointed in a High Court action to receive his interest. The division court Judge gave judgment against the garnishees.

An appeal to a Divisional Court was allowed on the ground that such interest was not attachable under section 179 of the Division Courts Act, R.S.O. 1897, ch. 60.

THIS was an appeal from a judgment of the Judge of the second division court of the county of Lincoln refusing a new trial on the application of the garnishees.

The primary creditor issued a garnishee summons on 4th December, 1902, for \$131.50 in the above court and served it the same day on the garnishees, Ezra Rittenhouse and William Honsberger, executors of the will of Ann Wismer, who died on the 17th July, 1902, leaving Kratz the residuary legatee under her will, who was alleged to be indebted to the primary creditors in the above sum, the executors having ample funds in hand to pay the judgment.

Subsequently, on the 17th of December, 1902, an *ex parte* order was made in an action in the High Court of *Rittenhouse v. Kratz*, appointing the plaintiff in that action, one Saloma Rittenhouse, receiver of the interest of the primary debtor as such residuary legatee, under the will of Ann Wismer, until the 30th December, 1902, when a further order was made continuing the same.

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The executors had filed a petition in the surrogate court on the 27th November, 1902, to pass their accounts, and these were audited and passed on the 18th of December.

On the 13th of January, 1903, judgment was given in the division court action in favour of the primary creditor for \$131.50 and costs, and against the garnishees to the extent of funds in their hands.

The garnishees then applied for a new trial to the division court Judge on the ground that the primary debtor's interest in the Wismer estate, as residuary legatee, did not constitute a debt due or accruing due to him, and was not attachable, and the Judge dismissed the application and refused a new trial.

From that judgment the garnishees appealed, and the appeal was argued on the 4th of March, 1903, before a divisional court, composed of FALCONBRIDGE, C.J., K.B., STREET, and BRITTON, JJ.

H. H. Collier, K.C., for the appeal. The interest of a residuary legatee is not attachable under section 179 of the Division Courts Act R.S.O. 1897, ch. 60, the language of which is substantially the same as Con. Rule 911. There is no debt due or accruing due to the primary debtor by the garnishees. Before the Judicature Act only legal debts could be attached; since that Act both legal and equitable debts may be, but still only debts. *Macdonell v. Hollister* (1855), 3 W. R. 522; *Webb v. Stenton* (1883), 11 Q.B.D. 518; *Booth v. Trail* (1883), 12 Q.B.D. 8; *Stuart v. Grough* (1888), 15 A.R. 299.

J. A. Keyes, contra. All the debts of the estate are paid and there are sufficient funds in the hands of the executors, the property of the primary debtor, and so applicable to the payment of his lawful debts and attachable. In *Macdonald v. Hollister*, 3 W. R. 522, it was decided that funds in the hands of an executor could not be attached unless there had been such an account stated between the executor and the legatee as would entitle the legatee to maintain an action; but *McLean v. Bruce* (1891), 14 P.R. 190, partly overrules that case. I also rely on *Flemming v. Stephenson* (1892), 28 C.L.J. 570; *Leaming v. Woon* (1882), 7 A.R. 42; *In re Cowan's Estate*, *Rapier v. Wright* (1880), 14 Ch. D. 638; *Trust & Loan Co. v. Gorsline*

(1888), 12 P.R. 654; *Canada Cotton Co. v. Parmalee* (1889), 13 P.R. 308; *Stuart v. Grough*, 15 A.R. 299, at p. 304; *Booth v. Trail*, 12 Q.B.D. 8.

Collier, in reply. *McLean v. Bruce*, 14 P.R. 190, and *Flemming v. Stephenson*, 28 C.L.J. 570, were decided under the old Con. Rule 935, which was much wider than the present Con. Rule 911, and permitted the attachment of all claims and demands of the judgment debtor against the garnishee arising out of trust or contract where such claims and demands could be made available under equitable execution. See *Central Bank of Canada v. Ellis* (1893), 20 A.R. 364, *per* Osler, J.A., at p. 365.

At the close of the argument, the judgment of the Court was delivered by FALCONBRIDGE, C.J.:—We are all agreed that this residuary legatee's interest in the estate was not an attachable debt under sec. 179 of ch. 60 R.S.O. The cases cited support that view. The new rule also supersedes the old one, which was much wider. The appeal should be allowed with costs and the garnishee discharged.

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[IN CHAMBERS.]

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REX EX REL. ROBINSON V. McCARTY.

April 6.

Municipal Elections—Township Councillor—Disqualification—Membership in School Board “for which Rates are Levied”—Resignation—Non-acceptance—Designation of Board—Relator’s Claim to Seat—Notice to Electors—Costs—Status of Relator—Discretion.

Held, that the respondent, being a member of the school board for a union school section, a school board for which rates were levied, and his resignation as such not having been accepted by his co-trustees, was, by 2 Edw. VII. ch. 29, sec. 5 (O.), disqualified for the office of township councillor; and it was not material whether the school corporation of which he was a member was called a “board of public school trustees of union section,” etc., or a “public school board.”

The respondent’s qualification not having been objected to at the nomination, so that the electors might have an opportunity of nominating another candidate, the defeated candidate was not entitled to the seat.

Rex ex rel. Steele v. Zimmerman, ante 565, followed.

It appearing to be the fact, but there being no actual proof, that the relator was put forward by the clerk of the township, and the relator having put the respondent to expense by his unsuccessful claim to have the defeated candidate seated, while the election was set aside and a new election ordered, no costs were given to either party.

APPLICATION in the nature of a *quo warranto* under the Municipal Act to set aside the election of the respondent as a councillor for the township of East Nissouri. The facts are stated in the judgment.

The motion was heard by Mr. Winchester, Master in Chambers, on the 21st March, 1903.

J. P. Mabee, K.C., for the relator.

A. B. Aylesworth, K.C., for the respondent.

April 6. THE MASTER IN CHAMBERS:—This is an application on behalf of the relator, Jacob Green Robinson, of the township of East Nissouri, in the county of Oxford, farmer, who has an interest in the election hereinafter referred to as a voter thereat, for an order setting aside and declaring invalid and void the election or pretence of an election held on the 5th day of January, 1903, at the township of East Nissouri, in the county of Oxford, under which election or pretended election Byron B. McCarty, the above-named respondent, hath unjustly usurped and still doth usurp the office of councillor, and declar-

ing that Thomas Richardson was duly elected thereto, and ought to have been returned at such election and should now be admitted thereto, upon the grounds:

1. That the said election was not conducted according to law.

2. That the said respondent Byron B. McCarty was not duly elected or returned.

3. That the said respondent Byron B. McCarty was and is disqualified from sitting or acting as councillor for the said township of East Nissouri, and at the date of election was and is still a trustee of the board of school trustees for union school section number 5 East Nissouri, a school board for which rates are levied.

And for an order declaring that Thomas Richardson was duly elected to the office of councillor for the said township of East Nissouri, and should now be admitted thereto.

The application is founded upon the affidavit of the relator, who merely states that he believes the several grounds which are set forth in the notice of motion against the validity of the election therein mentioned, are well founded, and the affidavit of the clerk of the municipal corporation of the township of East Nissouri. This is the municipal corporation to which the respondent was elected. The clerk's affidavit refers to the election, etc., and states that the respondent and Dugald McDonald, Herman G. Gleason, Edwin McLeod, and Thomas Richardson, were nominated as candidates for the office of councillors, and that the first four named were elected on the 5th January, 1903, they having received the highest number of votes cast; that the respondent duly filed his declaration of office and took his seat in the council on the 12th January, 1903; and he proceeds to say further: "7. That at the time of the nomination and election to the said council of East Nissouri the said respondent Byron B. McCarty was one of the trustees of the board of school trustees for union school section No. 5 of the township of East Nissouri, and that the said Byron B. McCarty is still a member of the board of school trustees of union school section No. 5 East Nissouri, being a school board for which rates are levied by the municipal council of the township of East Nissouri.

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8. That at the nomination for reeve and councillors the matter came up for discussion, and it was pointed out to the electors that the said defendant Byron B. McCarty was a member of said board of school trustees of the said union school section No. 5 East Nissouri."

The respondent filed his own affidavit in answer to the application, in which he states that he was elected to and served in the council of the township of East Nissouri for 1902, and that at the request of different ratepayers of said township he determined to become a candidate for the same position in 1903, and having been one of the trustees for union school section No. 1 and 5 in the township of Oxford and East Nissouri, first being elected in January, 1899, and re-elected in January, 1902, and as he had heard that his holding the said office of school trustee might be deemed in law to disqualify him from continuing his office as councillor, he determined to resign his said office of school trustee. Accordingly, on the 26th November, 1902, at a meeting of the three trustees for said union school section, he formally resigned the said office, and asked the other two trustees to consent to his resignation, and one of them consented in writing to the acceptance of such resignation and formally moved that the resignation be accepted by the school trustees, but the other trustee refused to consent to said resignation, and nothing further was done, though he persisted in his resignation, and did not attend any meeting of the said trustees or in any way act as a trustee before nomination day. In paragraph 6 of his affidavit he states: "6. I was regularly nominated for the position of councillor of the said township at the nomination meeting for that purpose held on the 29th day of December last. I was present throughout the whole proceedings at the said nomination, and I say that no notice either written or verbal was then given to the electors present that votes cast for me for the said office of councillor would be thrown away, nor was any such notice, so far as I am aware, given at any of the polls in the said township on the day of voting, nor otherwise in the said township during the said election."

He also states that, as the result of the polling at said election, he received the highest number of votes cast for any

of the candidates for councillor at said election, namely, 409 votes, while Thomas Richardson only received 323 votes, being the lowest number cast.

He also files the affidavits of the reeve and two councillors of the township of East Nissouri and also of a justice of the peace, in which they state that they were present at the nomination of councillors in question, and that the matter of qualification of the respondent for councillor was not discussed, and that no notice was given by any person at said nomination meeting that the respondent could not qualify for the position of councillor in said township.

In reply to these affidavits there have been filed six affidavits on behalf of the relator, the clerk of the township making one of them, and the trustee who refused to consent to accepting the resignation of the respondent as school trustee making another. The relator himself made none of these. These affidavits state that the respondent in his nomination speech told the electors that he was not disqualified from acting as councillor for the township of East Nissouri on account of being a member of a public school board; that he had had advice on the matter; and that, if elected, he could hold the office of councillor for East Nissouri; and the clerk of the township produces as an exhibit to his affidavit a circular issued by the respondent to the electors dated 31st December, 1902, in which he said: "You may be approached by a few people who for personal reasons seek to drive me out of the council against my wishes, and I believe against the will of the majority of the electors. Those parties are trying to draw a herring across the track by circulating the report that the position of rural school trustee which I held would prevent me from holding the position of councillor. But from information received from parties who are in a position to know there is nothing to prevent me from holding the position of township councillor should I be elected, and I, therefore, ask for your vote and influence on Monday next. . ."

From the nature of the evidence adduced by the relator I am of opinion that the real intent of the application is to seat the relator in the place of the respondent. This, however, cannot be done, under the circumstances, as it is not even

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attempted to be shewn that the relator's qualification was objected to at the nomination, so that the electors might have an opportunity of nominating another candidate: *Regina ex rel. Tinning v. Edgar* (1867), 4 P.R. 36; *Regina ex rel. Adamson v. Boyd* (1868), *ib.* 204; *Regina ex rel. Ford v. McRae* (1870), 5 P.R. 309, at p. 315; *Regina ex rel. Forward v. Detlor* (1868), 4 P.R. 197; and *Rex ex rel. Zimmerman v. Steele*, decided by Chief Justice Falconbridge on the 20th March, 1903, not yet reported.*

With reference to the grounds of disqualification alleged against the respondent I have had occasion to consider these fully in *Rex ex rel. O'Donnell v. Broomfield*, in which I followed the decision of the Chief Justice of the King's Bench in the *Zimmerman* case, and held the respondent to be disqualified for the reasons stated.†

In addition to the arguments put forward in *Rex ex rel. O'Donnell v. Broomfield*, counsel for the respondent herein contends that the respondent, being a trustee of union school section Nos. 1 and 5 in the townships of North Oxford and East Nissouri, does not come within the disqualifying clause (2 Edw. VII. ch. 29, sec. 5 (O.)) which states "and no member of a school board for which rates are levied." It appears to me that it is not material whether the respondent is a member of a corporation called "The Board of Public School Trustees for Union School Section," etc., or whether he is a member of "The — Public School Board;" he is a member of a school board within the provisions of the "Act respecting Public Schools," 1 Edw. VII. ch. 39. It is evident from the different sections of this Act that the school section in question has a board of trustees, and also that rates are levied for its use. Even if the word "board" was not used in the Public Schools Act, there being a corporation formed to carry on the educational system of the townships or municipalities at the public expense, I would hold that the disqualifying clause in question would refer to the members of the corporation for the time being.

* Now reported *ante* p. 565.

† See *ante* p. 596.

With reference to the costs of these proceedings, I am of opinion from the facts stated by me that the relator has been put forward by the clerk of the township, and that the latter is in reality the relator—his affidavits to my mind indicate that fact.

In *Regina ex rel. McMullen v. DeLisle* (1862), 8 U.C.L.J. 291, the late Chief Justice Richards, in delivering judgment, said: "When the writ in this matter was applied for, I intimated my opinion that the clerk of the council was not the proper person to move to set aside the election of a member of the body of which he was the servant; . . . I further intimated at the time, that I should probably, if called upon to decide the case, refuse costs to the relator, with a view of discountenancing the practice of persons in his position becoming relators in these proceedings." This case was followed by the late Master in Chambers in *Regina ex rel. Brine v. Booth* (1883), 9 P.R. 452, where, while unseating the respondent, he did so without costs, owing to the fact that the relator was the auditor of the village of which the respondent had been elected a councillor. I do not think, however, that I should follow these decisions, in the absence of actual proof that the clerk of the township herein is behind these proceedings. The relator has put the respondent to considerable expense with reference to his claim to be seated. These costs should be paid by the relator. Under the circumstances, therefore, I consider that a proper exercise of discretion as to costs will be that each party pay his own costs. The seat to be declared vacant and a new election ordered.

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[MACLENNAN, J.A., FALCONBRIDGE, C.J.K.B.]

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RE EAST MIDDLESEX PROVINCIAL ELECTION.

March 18.

ROSE ET AL. V. RUTLEDGE.

Parliamentary Elections—Corrupt Practices—Agency—Delegates to Nominating Convention—Authorization—Treating—Meetings of Electors—Treating by “Candidate”—Previous Habit of Treating—Rebuttal of Presumption—Absence of Corrupt Intent.

The respondent was nominated as a candidate for election as a member of the Legislative Assembly for Ontario by a party convention, and, in acknowledging and accepting the nomination, he said: “There are three things essential to success: first, a good cause; second, proper organization; third, hard work. The first we have; the second and third will largely depend on you:”—*Held*, that the respondent by these words constituted every delegate who was present his agent, and became responsible for all that was afterwards done by them in organization and work for the purpose of the election.

The respondent requested M., who was at the convention as a delegate, to go with him to a factory and introduce him to the workmen, some of whom were voters. M. did this, and the respondent addressed the workmen on behalf of his candidature. After the meeting was over, and the workmen had dispersed, M. asked the foreman to have a drink at a neighbouring inn, which the foreman declined. M. also said that if the workmen who went home in that direction would come over, he would “leave a drink for them there.” This conversation was not in the presence of the respondent, nor heard by him. When the men were leaving their work for the day, the foreman told them what M. had said, and eight or ten of them called at the inn and got a drink of beer without paying for it:—

Held, that a charge of treating a meeting assembled to promote the election, under sec. 161 of the Ontario Election Act, failed upon this evidence, for the meeting had come to an end before anything was said about the treating, and the men were not told anything about it till nearly three hours afterwards. Nor did the evidence support a charge under sec. 162 (1) of corrupt treating of individuals in order to be elected, M. being a customer of the factory and following a previous habit in his intercourse with the men.

Upon a charge of treating a committee meeting held at a hotel, the evidence was that McC., one of the delegates to the convention, brought into the room where the meeting was being held a box of cigars for the use of the members of the committee. He said he did it at the request of the landlord. It was not shewn by whom payment was made:—

Held, that the charge was not proved, for it is the person at whose expense the treat is supplied, or who pays or engages to pay for it, who alone is guilty of the offence.

The respondent admitted that he had treated on the day of the convention, after the convention was over, several times, at at least two hotels, several persons, some of whom might have been electors. He denied, however, that the treating had any relation to the election:—

Held, that under sub-sec. 2 of sec. 162 (added by 62 Vict. (2) ch. 5, sec. 7 (O.)), treating generally or extensively or miscellaneously is only *prima facie* a corrupt practice. If it be shewn that the treating was not in fact done corruptly in order to be elected or for being elected or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of sub-sec. 2. There may still be innocent treating, though, if it be general or extensive or miscellaneous, the onus of shewing that it is innocent is upon the respondent. And an antecedent habit of treating must still help, among other things, to rebut the inference of corrupt intent.

Held, also, that, although the respondent did not become a "candidate," within the meaning of sec. 2, sub-sec. 8, until the 27th March, yet if any corrupt acts in relation to the election were done by him before that date, they would affect the election, for the Act applies to everything done at any time before an election by a person who is afterwards elected.

Youghal Election (1869), 3 Ir. R.C.L. 530, 1 O'M. & H. 291, followed.

It was shewn that the respondent and his chief agent had on several occasions in the course of the canvass treated in bars. The respondent was a physician, with a large country practice, and constantly on the road. He was also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating, and he continued to treat after his nomination by the convention on the 1st February until the writ for the election was issued, on the 22nd April:—

Held, that no corrupt intent having been shewn in any of the instances of treating proved, the election was not thereby avoided.

West Wellington Case (1895), 2 E.C. 16, distinguished.

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PETITION under the Ontario Controverted Elections Act to avoid the election of the respondent as member for the electoral district of the east riding of Middlesex in the Legislative Assembly for Ontario.

The petition was tried by MACLENNAN, J.A., and FALCONBRIDGE, C.J.K.B., at London, on the 15th, 16th, 17th, and 18th October, and at Toronto, on the 29th and 30th December, 1902.

W. Cassels, K.C., *E. Meredith*, K.C., *W. D. McPherson*, and *P. H. Bartlett*, for the petitioners.

A. B. Aylesworth, K.C., and *J. M. McEvoy*, for the respondent.

March 18. The following judgment was delivered on the question of treating. PER CURIAM:—In the *West Simcoe* case (1883), 1 E.C. 128, it was held by the rota Judges, and affirmed in appeal, that when a candidate is nominated by a convention, and in addressing it requests the support of its members, he thereby makes every member present his agent. In the present case the respondent was nominated by a convention on the 1st February, and, in acknowledging and accepting the nomination, he said, according to a newspaper report of the proceedings, which he admitted to be correct: "There are three things essential to success: first, a good cause; second, proper organization; third, hard work. The first we have; the second and third will largely depend on you." We think that by these words he constituted every delegate who was

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present his agent, and became responsible for all that was afterwards done by them in organization and work for the purpose of the election. The convention was of delegates selected by the Liberal Association of the riding. Numerous committees were afterwards organized, a good many of them by the express directions of Mr. Jared Vining, who was the respondent's secretary and legal adviser throughout the campaign. . . .

The remaining charges are charges of treating in contravention of secs. 161, 162, and 163 of the Election Act.

Charge 25 is a charge of treating a large number of electors assembled at a meeting for the purpose of promoting the election, at the Canadian Packing Company's premises near Pottersburg, contrary to sec. 161. It was not sought to affect the candidate personally by this charge, nor otherwise than through Daniel McIntyre, an agent. We think McIntyre was an agent by reason of his presence as a delegate to the convention, and a member of committee. The respondent requested McIntyre to go with him to the Canadian Packing Company's place to introduce him to the workmen, some of whom were voters. This he did, and, by arrangement with the foreman or manager, the workmen, about 50 in number, about half of them being voters, were assembled, and there addressed by the respondent for about a quarter of an hour on behalf of his candidature. This was early in the afternoon, about 3 o'clock. After the meeting was over, and the workmen had dispersed to their respective duties, and after the respondent and McIntyre had left the room with Larsen, the foreman, McIntyre asked Larsen to come over to an inn in the neighbourhood and have a drink. He also said to him that if the men who went home in that direction would come over they could also have a drink; he would leave a drink there for them. Larsen said he could not go, but he would tell the men. This conversation was not in the presence of the respondent, nor heard by him, he being at the time engaged in conversation at a distance with another man. When the men were quitting work about six o'clock, Larsen told them what McIntyre had said, and it was shewn that in the evening as many as eight or ten of the factory workmen called at Barnes's

and got a drink of lager without payment. We think this charge as laid, that is, as a charge of treating a meeting assembled to promote the election, under sec. 161, altogether fails, for the reason that the meeting had come to an end and had dispersed before anything had been said about the treating; and the men were not told anything about it until nearly three hours afterwards: *North Waterloo* (1899), 2 E.C. 76, in appeal. See also *Prescott* (1883-4), 1 E.C. 88, 116, 117.

It was hardly contended that the charge could be supported under sec. 162 (1) as one of corrupt treating of individuals in order to be elected. We think it is plain that McIntyre's object was to retain the goodwill of the factory people towards himself, as a customer having large dealings there, and following a previous habit in his intercourse with them, and not for the purpose of affecting the election.

The Pottersburg charges must be dismissed.

Charge 122 was one of treating a committee meeting at Charles's hotel, Belmont, by bringing into the room for the use of the members of the committee a box of cigars. We think it was proved in the clearest manner that this was done by Neil McCallum, who was a delegate to the convention, and therefore an agent. McCallum said he did it at the request of the landlord. The petitioners' counsel asked for and obtained time to prove by whom payment was made, but no such evidence was given, and for want of it the charge fails, inasmuch as it is the person at whose expense the drink or other entertainment is supplied, or who pays or engages to pay for it, who alone is guilty of the offence.

It was also charged that there was corrupt treating at the bar after the meeting. There was some drinking there afterwards, no doubt the usual treat in such cases, in which the respondent and Vining, his secretary, took part, but the evidence failed to shew that there was any corrupt intent on the part of any one.

The Belmont charges must therefore be dismissed.

Charges 70, 71, and 72 are of treating by the respondent or his agents on the 1st February, the day on which he was nominated by the convention. The charges are founded upon

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sub-sec. 2 of sec. 162,* and allege the giving of "refreshment at three different hotels in the city of London, viz., the Fraser House, the Dominion House, and the O'Neill House," "extensively, or generally, or in a miscellaneous manner to electors." The names of 13 different persons are specified in the particulars, but none of them was called, and the only evidence in support of the charges is that of the respondent himself, who admits having treated on that day, after the convention was over, several times, at two at least of the hotels specified, several persons, some of whom may have been electors of East Middlesex. He denies, however, that his treating had any relation to the election. It was argued that under sub-sec. (2) the mere fact of treating generally or extensively or miscellaneously was sufficient to constitute a corrupt practice. That no doubt is so, in the absence of explanation. It is so *primâ facie*, but only *primâ facie*. The treating must still be done corruptly in order to be elected or for being elected, or for the purpose of corruptly influencing votes. If it be shewn that it was not in fact so done, then it is no offence now any more than it was before the enactment of sub-sec. (2). It was also contended that the habit of the respondent with regard to treating could no longer be regarded in considering such charges. But that is not so. What the statute says is, that the habit of treating shall not be a *sufficient* answer.† The Legislature might have enacted that the mere fact of treating by a candidate or his agents during an election campaign should be a corrupt practice, but it has not done so. There may still be innocent treating, though, if it be general, or extensive, or *miscellaneous* (whatever that may mean), the onus of shewing that it is innocent is thrown upon the respondent. And, undoubtedly, an antecedent habit of treating must still

* This sub-section was added to sec. 162 by sec. 7 of 62 Vict. (2) ch. 5 (O.); and is as follows: "(2) The giving of meat, drink, refreshment or provisions to electors extensively or generally, or in a miscellaneous manner, by a candidate, or by an agent of such candidate, or the taking part therein by either, or giving the same wholly or partly at the expense of such candidate or of such agent, shall *primâ facie* be a corrupt practice under this section."

† R.S.O. 1897, ch. 9, sec. 163 (2).—"It shall not, upon the trial of an election petition, be a sufficient answer to a charge of treating electors, that the person charged had been in the habit of treating."

help, among other things, to rebut the inference of corrupt intent.

It was contended that this treating, having taken place on the 1st February, could not be brought within the statute, because the respondent did not at that time come within the definition of the word "candidate" in sec. 2, sub-sec. 8, inasmuch as there had not yet been a dissolution of the existing Legislature, and East Middlesex was not vacant. By the Act 1 Edw. VII. ch. 41, sec. 1, it was provided that, unless sooner dissolved, the existing Assembly should continue until dissolved, or, if not dissolved, until prorogued, and for ten days afterwards, and no longer. It was prorogued on the 17th March, and therefore, it expired on the 27th March. That, therefore, is the date after which the respondent became a candidate within the meaning of the definition. We were for some time of opinion that any treating on or before the 27th March was not within the Act by reason of the definition. The contrary has, however, been decided by the Court of Common Pleas in Ireland, and upon the whole we think rightly. It follows that the Act applies to everything done at any time before an election by a person who is afterwards elected: *Youghal Election* (1869), 3 Ir. R.C.L. 530, 1 O'M. & H. 291, 293. We think those charges must be dismissed.

The next charge is No. 113, one of treating at Chittrick's hotel, by the respondent and Vining. Johnson, a witness, says he was on the list as a manhood suffrage voter, having no other qualification; that both respondent and Vining treated three or four persons in the bar; and that, as the respondent went out, the respondent said to him not to forget him on election day. Hayes, another witness called for the petitioner, corroborates Johnson, except that he heard no word spoken about the election. The respondent admits that he treated, but denies positively that he said anything about the election to Johnson or to any other man either then or at any time in a bar-room. We think this charge fails.

The next charges are Nos. 93, 95, 96, and 97—treating at Hyde Park. There had been a large committee meeting at a school house, forty or fifty present. After the meeting four or five persons went to a hotel near by, and there was a treat by

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Fisher, who was chairman of the meeting, and also by Vining, but the respondent and Vining and Fisher all left immediately, and we do not think it can be held that what occurred had any relation to the election. These charges must also be dismissed.

The next charge was No. 114—treating by respondent at Drake's. The respondent had put up his horse there, and on going away treated one or two strangers who happened to be there. Nothing was said about the election. This charge also fails.

The next charges were Nos. 116 and 117, of treating at Burton's. Vining was with the respondent. There seems to be nothing in these charges. There was a treat by Vining, and the two or three persons present appear to have been from the city, and not to have been voters in the riding.

The next charge, No. 125, was of treating at St. John's. The respondent and Vining called there on their way from a committee meeting. Respondent thinks he treated, but does not remember whether there was any one else present but those two; he may have included the landlord in the treat, but there was no reference to the election. We think there is nothing in this charge.

Charge 119—treating at Gillson's. The respondent called there in passing, to water his horse; Vining with him. He was not acquainted with the landlord, and Vining introduced him; there was another man present, a stranger; the respondent treated, and there was no mention of the election. This is the respondent's account of it. Vining's is slightly different, but we think there is nothing in the charge.

Something was said of treating at Fraleigh's hotel at Lambeth, which was not included in the particulars, but as to which the respondent's examination was read. It comes to no more than this, that on some occasion he may have treated electors there, but whom or when did not appear, but in doing so he had no thought of the election. Nothing can be made of this charge.

Charge 118. Treating at Creighton's at Elginfield. The respondent and one Fraser called there; Fraser introduced the respondent to Creighton, and while there Fraser treated the

respondent to a cigar. We think nothing can be made of this charge.

Charges 101, 102, 103. Treating at Ilderton Fair. After a careful perusal of the evidence, we think it is not established that the respondent treated on that occasion at all, and the charges therefore fail.

It was very earnestly and forcibly argued on behalf of the petitioners, that the instances on which the respondent and his agent Vining had in fact treated in bars in the course of the canvass beginning on the day of the convention on the 1st February, and having regard to the considerable sum which he admitted to have spent in that way, constituted an extensive or general or miscellaneous treating within sec. 162 (2), and the *prima facie* effect of that had not been rebutted. We are, however, of a different opinion. The respondent is a physician, with a large country practice, and therefore constantly on the road. He is also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating. He seems to have asked his solicitor, Vining, whether he might continue that habit, and he was advised by him that there was no law against it until the writ was issued, which is said to have been on the 22nd April. The respondent, therefore, continued his usual habit until that date, after which he treated no more. The advice he received was unfortunate, for it has resulted in this tedious trial. We have already said that extensive and general or miscellaneous treating is only *prima facie* corrupt, and may in fact be perfectly innocent; and that a previous habit of treating is still an important consideration in determining whether it is corrupt or not, although not in itself sufficient. Here the respondent had been in this habit, and simply continued it for a certain time, and there is not a single witness but one (Johnson) who says that on any occasion reference was made to the election. How different this case is from the *West Wellington* case (1895), 2 E.C. 16, where the candidate, who had not had the previous habit of treating, was shewn to have done so in numerous cases, while actually canvassing the persons who were being treated, and discussing the election with them: pp. 17 to 20. The treating in that

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case was held by the rota Judges and by the Court of Appeal to have been corrupt; but even in that case Mr. Justice Osler dissented, holding that the corrupt intent was not sufficiently established.

It was in that case (p. 28) that Burton, J.A., observed, with reference to the amendment of the Act by sub-sec. 2 of sec. 163, that no Court or Judge had ever held that it was a sufficient answer to a charge of treating electors, that the person charged had been in the habit of treating; the inference being that the amendment practically left the law as it was before. As we are of opinion that, taken either separately or collectively, no corrupt intent has been shewn in any of the instances of treating proved, either on the part of the respondent or any of his agents, these charges all fail and ought to be dismissed.

The result is that the petition must be dismissed, and with costs.

E. B. B.

[BRITTON, J.]

CAREW v. GRAND TRUNK R.W. CO.

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April 9.

Railway—Farm Crossing—Obligation to Provide—Dominion Railway Act—Midland Railway Company—Ontario Statutes.

The plaintiff's father in 1882 conveyed part of his farm to the Midland Railway Company, who constructed their railway so as to sever the farm, but did not agree to make a farm crossing. In 1900 the father conveyed to the plaintiff all the farm not previously conveyed to the railway company :—

Held, that the plaintiff could not compel the defendants, who had acquired the Midland Railway in 1893, to provide a farm crossing, either by virtue of the Dominion Railway Act or of Ontario legislation applicable to the railway before 1893.

Review of the statutes affecting the Midland Railway Company.

Ontario Lands and Oil Co. v. Canada Southern R. W. Co. (1901), 1 O.L.R. 215, followed.

AN action tried at Peterborough on 15th December, 1902 before BRITTON, J., without a jury. The facts appear in the judgment.

R. Ruddy, for the plaintiff.

W. R. Riddell, K.C., for the defendants.

April 9. BRITTON, J. :—The plaintiff is the owner of all of the south half of lot 15 in the 3rd concession of the township of Emily, except the right of way of the defendants, the defendants having purchased land for their road in 1882.

As the plaintiff owns the land on both sides of the railway, he brings this action to compel the defendants to construct a crossing so that he can properly work his farm. The material facts are not in dispute, and they seem to bring the case within the decision of Mr. Justice Meredith in *Ontario Lands and Oil Co. v. Canada Southern R.W. Co.* (1901), 1 O.L.R. 215, unless there is something which makes a difference in one or more of the Acts which from time to time applied to the Midland Railway Company, which company constructed the portion of the road in question, and whose railway is now part of the defendants' system.

In referring to different statutes I omit certain amending Acts which have no application to the matter in hand.

The Peterborough and Port Hope Railway Company were incorporated in 1846 by 9 Vict. ch. 109.

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By 16 Vict. ch. 241, sec. 3, certain clauses of the Railway Clauses Consolidation Act (14 & 15 Vict. ch. 51) were incorporated with, and made to form part of, the Act incorporating the Peterborough and Port Hope Railway Company. One of the sections so made part of the charter of this company, is 13, which is as follows: "Fences shall be erected and maintained on each side of the railway, of the height and strength of an ordinary division fence, with openings, or gates, or bars therein, and *farm crossings of the road*, for the use of the proprietors of the lands adjoining the railway."

By 18 Vict. ch. 36 the name of this company was changed to "The Port Hope, Lindsay, and Beaverton Railway Company."

In 1869, by 33 Vict. ch. 31 (O.), the name of the company was changed to "The Midland Railway of Canada."

In 1881, 44 Vict. ch. 67 (O.) gave power to construct a branch from Omemeë to Peterborough, and that line was constructed in 1882, passing over the south half of lot 15 in the 3rd concession of the township of Emily, the company acquiring by purchase the part required and used by them.

By 56 Vict. ch. 47 (D.) the Midland Railway became part of the Grand Trunk Railway.

By sec. 11 of the last mentioned Act, all the provisions of the several Acts then existing relating to the several companies, respectively so consolidated or amalgamated, were made to apply to the company formed by said amalgamation, but, in case of conflict in the provisions of the said Acts, the provisions of the Acts relating to the Grand Trunk Railway Company before the amalgamation should govern.

Prior to the last mentioned Act, "The Midland Railway" was subject to Ontario legislation, and if sec. 13 of 14 & 15 Vict. ch. 51 could now be considered as in force as part of the Act incorporating the company which afterwards became the Midland Railway Company, it might be argued with great reason that the plaintiff should succeed in this action, notwithstanding the amendments in the Ontario Railway Act.

The change in sec. 13 of the Railway Act was made in 1859, in the revision and consolidation of that year, when "and" was changed to "at," making the section read as if in.

that particular applicable to fences *at* farm crossings, instead of fences *and* farm crossings.

The Ontario Railway Act in force at the time of the construction of the branch under consideration was R.S.O. 1877, ch. 165, which does not compel the construction of farm crossings.

By 45 Vict. ch. 67 (O.), (1882), several railways were consolidated, including the Midland Railway of Canada, and sec. 8 of that Act is, in part, as follows: "All the provisions of the Railway Act of Ontario shall apply to the company as consolidated."

I am, therefore, of opinion that the plaintiff can not, merely as proprietor of lands along the railway, invoke the aid of the original sec. 13, made part of the Act of incorporation of the Peterborough and Port Hope Railway Company, to compel the defendants to construct the farm crossing across the railway from one part to another of plaintiff's land.

When this part of the road was constructed in 1882, all of the south half of lot 15 in the 3rd concession of Emily was owned by John Carew, father of the plaintiff. He made an agreement on the 16th February, 1882, to sell to the Midland Railway Company such land as the company might require for roadbed, etc. The price to be paid was \$85 an acre for the land, and a field of wheat to be paid for. The land taken was $7\frac{28}{100}$ acres, for which a conveyance was executed to the Midland Railway of Canada on the 2nd March, 1882, and for this land John Carew received \$618.80. John Carew then owned part of lot 16, as well as the south half of 15, and he obtained a crossing on 16, and from the north part of 16 had access to the north part of 15. No action was ever taken by John Carew to obtain a crossing on lot 15, nor was there any agreement in writing, or any agreement, between John Carew and the company, of which plaintiff can avail himself, as to a crossing on lot 15.

John Carew continued to occupy, as the owner, this south half of lot 15 until the 8th October, 1900, when he conveyed to the plaintiff "all that part of the south half of lot 15 in the 3rd concession of Emily not previously conveyed to the Grand Trunk Railway Company." He had never conveyed any part

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to the Grand Trunk Railway Company, but this inaccuracy of description is of no importance. The fact is, that the plaintiff never owned the land now owned by the defendants. The railway company did not cross any land of the plaintiff. The plaintiff is simply the owner of two parcels of land—one to the north and one to the south—both adjoining the railway. It so happens that there is a deep cutting where the railway crosses 15, and the plaintiff has no means of crossing the railway to get from one portion of his land to the other. It is conceded that if there is to be any crossing it must be by overhead bridge. The matter is unquestionably one of great importance to the plaintiff, who owns a valuable piece of farm land separated from his buildings by the railway passing through this cut.

I have said that the plaintiff cannot get assistance from Ontario legislation, nor will the Dominion Railway Act, as it was or as it is, give the plaintiff what he seeks by this action.

Mr. Justice Meredith in the case of *Ontario Lands and Oil Co. v. Canada Southern R.W. Co.*, at pp. 220 and 221, deals with sec. 191 of the Dominion Railway Act, 1888. I am unable to distinguish this case as to the application of the Dominion Act. The decision in that case, as stated in the head-note, is:

“Before the Dominion Railway Act of 1888 there was no statutable obligation upon a railway company to provide and maintain a farm crossing where the railway severed a farm, and sec. 191 of that Act . . . is not retrospective.”

I will, as in that case, in dismissing the action do so without prejudice to any question affecting any claim to a way of necessity.

In the statement of defence reference is made to a settlement by the defendants contributing towards the construction of an overhead bridge, and perhaps some settlement can yet be had, on the basis of the plaintiff being entitled to a right of way of necessity. No claim in this action was made on that ground and I cannot deal with it.

In view of all the facts, I think the action should be dismissed without costs.

E. B. B.

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THE EDINBURGH LIFE ASSURANCE COMPANY.

Constitutional Law—R.S.C. 1886, ch. 127, sec. 7—Interest—Mortgage Running Over Five Years—Payment—Tender of Amount—Agency.

Action to compel a mortgagee in Great Britain under the provisions of R.S.C. 1886, ch. 127, sec. 7, to accept the principal money and interest due on a ten year mortgage, which had run over six years :—

Held, that the section is *intra vires* of the Dominion Parliament and is not restricted in its application to such mortgages as are mentioned in section 3 of the Act, but applies to every mortgage on real estate executed after the first of July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage."

Held, also, that the words of section 25 of ch. 205 R.S.O. 1897, are wide enough to apply to mortgages executed prior to the passing of that Act.

Held, also, that the loan having been made, the property being situate, and the mortgage giving the option of payment, in Canada, the law of Canada must govern in relation to the contract and its incidents and that the tender made as described in the judgment was sufficient.

THIS was a special case stated for the opinion of the Court in an action for redemption.

The facts appear in the judgment.

The case was argued in Court on 3rd February, 1903, before BRITTON, J.

A. P. Poussette, K.C., for the plaintiffs. The mortgages in this case were for ten years, which have run for six and a half years, and the plaintiffs desire to pay them off, to settle up an estate. They have tendered, under the terms of the mortgage, to the defendants' duly authorized agents in Ontario a sufficient sum to cover principal, interest, three months' interest in lieu of notice, and costs, which the latter have refused to accept. The case comes under section 7 of R.S.C. 1886, ch. 127, and the action has been brought for a declaration that the mortgagees must accept their mortgage moneys, and that no further interest is payable on the mortgages. The statute became part of the contract, and the plaintiffs are entitled to the benefit of its provisions.

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F. W. Kingstone, and D. T. Symons, for the defendants.

On the facts stated, the plaintiffs shew no cause of action or right to relief. The defendants have not broken any contract, nor committed any tort. The time for the payment of the principal has not arrived, and the statute invoked does not make a loan for more than five years invalid or compel the mortgagee to accept payment of the principal before it falls due, and until that time has arrived, the plaintiffs are not entitled to bring an action for redemption: *Browne v. Cole* (1845), 14 Sim. 427; *Bovill v. Endle*, [1896] 1 Ch. 648. Section 7 of R. S. C. 1886, ch. 127, is taken from section 5 of 43 Vict. ch. 42 (D.) passed in 1880. That section is *ultra vires* of the Dominion Parliament. In order to determine that, the object of the latter must be ascertained. That object was to regulate a particular class of mortgages, and the section in question was introduced as merely ancillary to that object, or by way of penalty to enforce the other provisions in the Act. The object of the Act was to deal with matters (namely, property and civil rights), which, by the British North America Act, were placed within the exclusive powers of the Provincial legislature: *The Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, at p. 110; and that jurisdiction is as exclusive and absolute as the jurisdiction of the Dominion Parliament over matters within its jurisdiction: *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, at p. 586. The onus is on the plaintiffs to show the right of the Dominion Parliament to interfere. The section relating to interest is confined to a particular class of mortgages in connection with exceptional legislation; and is not general legislation such as the Dominion Parliament has power to pass: *L'Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31, at p. 36; *Archbold v. The Building and Loan Association* (1888), 15 O.R. 237; *The Royal Canadian Insurance Co. v. The Montreal Warehousing Co.* (1880), 2 Cart. 361. The power to legislate with reference to interest is a power to regulate not to prohibit: *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at p. 363; *Municipal Corporation of the City of Toronto v. Virgo*, [1896] A.C. 88, at p. 93. Even if the Act is valid, it should not be construed to change the

previous policy of the law, except as to the special class of mortgages referred to in it, and it does not apply to the mortgages in question here: *Minet v. Leman* (1855), 20 Beav. 269, at p. 278. The latter were not within the mischief which the Act attempted to remedy, and the words used were not intended to include all mortgages; if so, they would include municipal and railway debentures extending over many years. The general words must be confined to the class of mortgages which were the subject of the statute: *Twycross v. Grant* (1877), 2 C.P.D. 469, at p. 483. The defendants are expressly authorized by an Imperial statute, 8 & 9 Vict. ch. 76, to lend money—they contracted for payment with a view to the application of the law of England—on mortgages in Canada, and their rights cannot be abrogated or interfered with by the Dominion Parliament: *Regina v. The College of Physicians and Surgeons of Ontario* (1879), 44 U.C.R. 564; *Smiles v. Belford* (1877), 1 A.R. 436; *Routledge v. Lowe* (1868), L.R. 3 H.L. 100, at p. 113; *Fitzgerald v. Champneys* (1861), 2 J. & H. 31, at p. 54; Maxwell's Interpretation of Statutes, 3rd ed., pp. 242-250. The tender was bad, not being made in gold or Dominion notes. It purported to be made under an Act enabling a mortgagor to break his contract on certain specified terms, and must be strictly complied with. It was not made to the company, the only party entitled to receive the money. The onus is on the plaintiff to shew authority to receive in the party to whom the tender was made, and it has not been satisfied. The alleged authority was only to receive certain documents specified in the mortgages. The defendants' solicitors, as solicitors, had no authority to receive the principal money: *In re Tracy, Scully v. Tracy* (1894), 21 A.R. 454. We refer also to Hardcastle's Statute Law, 3rd ed., p. 84; *In re Missouri Steamship Co.* (1888), 42 Ch. D. 321; *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202, at p. 207; *South African Breweries, Ltd., v. King*, [1899] 2 Ch. 173; *Van Grutten v. Digby* (1862), 31 Beav. 561, at p. 568; Dicey on Conflict of Laws, p. 553; *Story v. McKay* (1888), 15 O.R. 169.

John Cartwright, K.C., Deputy Attorney-General, for the Province of Ontario. Section 7 of R.S.C. 1886, ch. 127, is entirely outside the jurisdiction of the Dominion Parliament.

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That Act might more properly have been intituled "An Act to enable mortgagors to break their contracts." It is not general legislation, as it only applies to mortgages of real estate and to a mortgage having run for five years. Such matters come within property and civil rights: British North America Act, sec. 92, sub-sec. 13. What is to be considered is the real object of the legislation: *Regina v. Wason* (1889), 17 O.R. 58, (1890), 17 A.R. 221. The object of the Act in question was to change, or enable parties to change, their contracts. That cannot be done by giving it another name, and applying it to interest. The British North America Act had not been considered by the Privy Council, at the time this Act was passed, as fully as it subsequently was in *The Citizens Insurance Co. of Canada v. Parsons*, 7 App. Cas. 110. If that case had been decided first, the Act probably would not have been passed. In 1886 a Bill relating to interest extending this legislation was withdrawn in deference to the Minister of Justice's opinion: Lefroy's Law of Legislative Power in Canada, p. 389.

Poussette, in reply. The tender in gold is waived by the terms of the mortgage. The Act only relieves from the recovery of interest, over which the Ontario Legislature has no jurisdiction, and it has received judicial recognition: *In re Parker, Parker v. Parker* (1894), 24 O.R. 373. The plaintiffs only ask to be relieved of interest. The Dominion Parliament has the right to interfere under sec. 91 of the British North America Act. The defendants' Imperial Act merely gives them power to lend money in Canada, but it is no mandate to Canada or Canadians. The contract was not made in England, nor to be performed there, but even if it was, it related to land in Canada, and, if so, the *lex loci rei sitæ* governs. I refer also to *Curtis v. Hutton* (1808) 14 Ves. 537; *Doe d. Birtwhistle v. Vardill* (1826), 5 B. & C. 438.

The Minister of Justice of the Dominion was notified, but was not represented on the argument.

March 23. BRITTON, J.:—The plaintiffs are the executors of the will of the late Thomas Bradburn.

After previous negotiations between solicitors for the parties, Thomas Bradburn, on the 9th October, 1895, made

formal application to Kingstone, Wood & Symons, solicitors for the defendants, for a loan of \$50,000 at $4\frac{1}{2}$ per cent. for ten or fifteen years.

The defendants had in Toronto, in addition to the solicitors named, an advisory committee. The application was referred to this committee, the committee recommended the loan, and the application and recommendation were forwarded by Kingstone, Wood & Symons to the defendants' manager in Edinburgh, who submitted the matter to the board of directors of the defendant company. The directors accepted the loan, and Thomas Bradburn was notified of such acceptance by cable.

The loan was made, the security therefor being :

1st. Mortgage upon real estate in Ontario, dated 25th January, 1896.

2nd. Mortgage upon leasehold, dated 17th February, 1896, expressed to be made as collateral security for the mortgage upon the real estate ; and

3rd. A bond by Thomas Evans Bradburn, son of Thomas Bradburn, and now as an executor, one of the plaintiffs in this action.

This bond is in the penal sum of \$100,000, conditioned for the payment by Thomas Bradburn to the defendants, of the money to become due on, and for the performance of the covenants in the mortgage given by Thomas Bradburn on the realty.

This mortgage is for £10,273 19s. 6d., stg., with the proviso that it is to be void on payment at the office of the British Linen Company Bank in London, England, of the principal sum with interest, also payable at said bank, at $4\frac{1}{2}$ per cent. per annum, as follows : principal on 15th January, 1906, and the interest half-yearly on 15th January and July in each year. All monies to be paid in gold coin, or its equivalent in sterling money if required.

It is expressly provided in the mortgage that a bank draft on London, England, made in favour of the mortgagees, payable on presentation thereof, and delivered to the agent, in Toronto, aforesaid of the mortgagees, or mailed in the post-office at Peterborough aforesaid, addressed to the said British Linen Company Bank, directed to be placed to the credit of

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the mortgagees, and duly registered, shall, unless subsequently dishonoured, be considered as equivalent to the payment at the office of the said British Linen Company Bank in London, England, of a like amount to that named in said draft on the day of such delivering or mailing.

It was also provided that the mortgagor should have the right to pay, on account of principal, at the end of any year of the said term, the sum of £1,027 8s. 0d. (\$5,000), on condition of four months' previous notice of intention to make such payment.

Owing to loss by fire, and the application of certain insurance money, the mortgage has been reduced to £8,441 2s. 0d., sterling, of principal, and, at the time of the commencement of this suit, stood at that amount.

In June, 1902, the executors (plaintiffs), for the purpose of winding up or "making an adjustment of the affairs of the estate," desired to pay off this mortgage. Negotiations followed, the defendants refused to accept the money on such terms as the plaintiffs offered, and the plaintiffs thereupon invoked ch. 127, sec. 7, R.S.C. 1886, claiming the right to pay off this mortgage by paying the principal and all interest which had accrued, and three months' additional interest.

On the 3rd December, 1902, the plaintiffs formally tendered to Kingstone, Symons & Kingstone, as solicitors and agents for the defendants, at their office in Toronto, a bank draft on London, England, for £8,683 5s. 0d., making up the amount, as follows:—

For principal	-	-	-	-	£8,441	2	0
For interest to 3rd December, 1902,					146	14	9
For three months' interest by way							
of bonus	-	-	-	-	94	19	3
For costs of cablegrams	-	-	-	-	0	9	0
					<hr/>		
					£8,683	5	0

This was refused.

It is admitted in this case, and for the purposes of this action, that the figures are correct in amount on the basis stated in the offer.

The defendants contend:—

1. That sec. 7 of ch. 127, R. S. C. 1886, was and is *ultra vires* of the Parliament of Canada.

2. That even if *intra vires*, it was not intended to apply to such mortgages as those in question in this action.

3. That the parties contracted with a view to the application of the law of England as to payment of said mortgage.

4. That as defendants were a company authorized by an Imperial Act to lend money in Canada, before the passing of the British North America Act, ch. 127, sec. 7, was not intended to, and did not, abrogate or diminish the powers previously granted to the defendants by their Imperial Act.

5. That the tender was not sufficient; and

6. That the whole facts do not disclose any cause of action by the plaintiffs against the defendants.

I have first to determine the question raised as to ch. 127 sec. 7, R.S.C. 1886, and I confess to no little difficulty in coming to a conclusion satisfactory to myself.

By sec. 91 of the British North America Act, the Dominion is authorized "to make laws for the peace, order, and good government of Canada, in relation to *all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces*; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated: that is to say:"

One subject, as No. 19, is "Interest."

Interest is not, but "property and civil rights in the Province," are, by section 92 of the British North America Act, assigned exclusively to the Legislature of a Province: sub-sec. 13.

The right to interest upon a contract for the same, made in a Province, is certainly a civil right in the Province; but if the Dominion alone has jurisdiction to legislate on the subject of interest, then the Province can deal with it as a civil right only, within the lines and subject to the limitations and restrictions laid down and imposed by Dominion legislation.

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Speaking of the British North America Act, Mr. Justice Ramsay says (*The Attorney-General of Ontario v. Mercer* (1883), 3 Cart. 1, at p. 107): "This Act gives rise to a difficulty of construction, which perhaps I may exaggerate but which is worthy of consideration, and that is the double enumeration which constantly occurs."

It is to be found prominently in sections 91 and 92. Its inconvenience there did not escape the observation of the framers of the Bill, for they have terminated section 91 by a saving clause of great importance, which makes section 92 subordinate to section 91.

This is one of the cases in which the jurisdiction of the Provinces and the Dominion overlap.

Lending money upon real estate or chattels and taking mortgages therefor is a question of property. Money is seldom lent except at interest, and next to getting security for its repayment, interest is the most important thing connected with the loan, and interest is one of the subjects reserved for the Dominion.

The Dominion Parliament has dealt with it in passing the statute under consideration, and there is the general presumption that the Legislature does not intend to exceed its jurisdiction.

It is argued for the defendants that the right of the Dominion to legislate is only as to rate, as to usury, leaving details and matters affecting contracts to the Provinces.

On the other hand, it is argued by the plaintiffs that the Dominion was intended to have, and has, power to deal with interest as to rate, and also when it shall and when it shall not be payable, even if in so dealing with it, in concrete instances, there is an apparent interference with property and civil rights.

The following cases, and other cases, establish that subjects, apparently within provincial jurisdiction, may be dealt with to a greater or less extent, when necessary, "to complete by ancillary provisions the effectual exercise of the powers given to the Dominion by the enumerated subject in section 91": Lefroy, pp. 431, 432: *The Citizens Insurance Co. v. Parsons*, 4 S. C. R. 215, at p. 330; *Edgar v. Central Bank* (1888), 15

A.R. 193, at p. 207; *Tennant v. The Union Bank of Canada*, [1894] A.C. 31.

In *Re Parker, Parker v. Parker*, 24 O.R. 373, the constitutional question was not raised, but the then Chief Justice of the Queen's Bench assumed that the Act was not objectionable, and applied it against an infant. That was a case in which there was equity in favour of the mortgagee, for the mortgage money was part of the purchase price; the sale having been made on favourable terms for the purchaser, as it was desired to have the money, or part of it, remain a longer time than five years. The Chief Justice held that made no difference.

In *Lynch v. The Canada North-West Land Company* (1891), 19 S.C.R. 204, the decision was that the ten per cent. added to unpaid taxes was a penalty for default, and not interest. As a penalty, the Act imposing it was within the competence of the Provincial Legislature, but it would not have been had it been "interest."

The judgment is, however, important as bearing upon the right of the Dominion to deal with contracts. Sir W. J. Ritchie, C.J., says on p. 207: "It is obvious that the matter of interest which was intended to be dealt with by the Dominion Parliament was in connection with debts originating in contract." He cites the statute, ch. 127, and discusses the sections 1 to 7 inclusive, without suggesting that this section 7 is *ultra vires* the Dominion. On page 212 he says: "The Dominion Act expressly deals with interest on contracts and agreements, as the first section conclusively shews."

In *Regina v. Wason*, 17 A.R. 221, Hagarty, C.J.O., says (p. 231): "In *Cushing v. Dupuy*, 1 Cart. 252, in the Privy Council, it was objected to the insolvent law that it interfered with civil procedure exclusively assigned to the Provincial Legislatures. It was answered in their Lordships' judgment that it was impossible to advance a step in a system of insolvency without interfering with civil procedure, that 'procedure must necessarily form an essential part of any law dealing with insolvency.' They say it is to be presumed that the Imperial Act necessarily implied the power to interfere with procedure so far as a general law of the proper cognizance of Parliament might affect it." Again, on p. 232: "I think we can well keep the

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two jurisdictions distinct, and as to each to adhere to the rule that where either has the right to legislate on a named subject, it must by necessary implication be held that all powers are given fully to carry out the object of the enactment although subjects such as civil rights, and procedure, civil or criminal, may be apparently interfered with."

In the same case, Burton, J.A., on p. 235, although in that case deciding in favour of provincial authority, uses this language: "Perhaps there is no rule more clearly and universally acknowledged in regard to the judicial construction to be placed upon statutes when the Courts are called upon to decide whether the subject-matter dealt with is within the competence of the particular Legislature which passed them, than this: that in cases of doubt every possible presumption and intendment will be made in favour of the constitutionality of the Act in question, the presumption being that when the subject matter appears to be within the class of subjects assigned to the particular legislative body which is assuming to deal with it, the enactment is valid and constitutional, and that the presumption is not to be overcome, unless the contrary is clearly demonstrated; in other words it will not be presumed that the Legislature entrusted by the Confederation Act with these great powers will transcend its authority."

After the best consideration I can give to this matter, my conclusion, contrary to first impression, is that sec. 7, ch. 127, R. S. C. 1886, is within the competence of the Dominion Parliament.

In so holding, I do not overlook the argument that, as a logical result, the Dominion can legislate to limit any contract to the shortest duration where interest is involved, nor do I overlook the decision in *The Citizens Insurance Co. of Canada v. Parsons*, L. R. 7 App. Cas. 96, that "property and civil rights" in section 92 of British North America Act, include rights arising from contract, . . . and are not limited to such rights only as flow from the law." It is, however, one thing to legislate where the contract has sole reference to security for money lent at interest, and quite a different thing to legislate in reference to other contracts where interest is only an incident. The question is simply as to the power. The

wisdom of the Dominion Parliament is likely to be equal to that of the Provincial, and private rights in regard to interest are not less likely to be protected in the Dominion than in the Provincial.

It was argued that even if this section 7 is *intra vires* the Dominion, it applies only to such mortgages as are mentioned in section 3 of the Act.

Section 7 is not so limited or restricted. By plain and unambiguous language, it applies to every mortgage on real estate executed after the 1st day of July, 1880, where the money secured "is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage."

The plaintiffs claim to be entitled to the benefit of sec. 25, ch. 205, R.S.O. 1897. This is a precisely similar section to sec. 7, ch. 127, R.S.C. 1886. It was first passed by the Ontario Legislature in 1897, and appeared in "The Loan Corporations Act," and is subsequent to the date of the mortgage now under consideration.

The words of this section are wide enough to apply to mortgages executed prior to the passing of that Act. There is no restraint as to its application, such as is found in ch. 127, R.S.C. 1886.

It is contended that this Ontario Act applies only to mortgages to loan corporations. I do not decide this.

Nothing turns on the company's act of incorporation. The company has its head office in Edinburgh, and has the right to lend money in Canada. It is given the right, as a company, to do what an individual can do, but it can have no higher or other rights.

It was argued that as the money is payable in Scotland, the law governing the right to pay or to refuse payment must be the law of Scotland, and not the law of Canada. The proviso for repayment is set out in paragraph eight of the special case. As the mortgage gives to the mortgagor the option of paying in Canada, the contract may be considered as if made in Canada, and to be performed here.

The loan was, in fact, made here, and upon property here. I think the law of Canada must govern in relation to the contract and its incidents.

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Applying the principles laid down in *Hamlyn & Co. v. Tallisker Distillery*, [1894] A.C. 202; *Jacobs, Marcus & Co. v. The Credit Lyonnais* (1884), 12 Q.B.D. 589; *In re Missouri Steamship Co.* (1899), 42 Ch. D. 321; and *South African Breweries, Limited, v. King*, [1899] 2 Ch. 173, it must be found that this contract was intended to be governed by the law of Canada.

Up to the time this mortgage was made, the statute now resisted was not questioned, and it is not unfair to the defendants to hold that they contracted, having regard to the possibility of this loan being paid before the time mentioned upon the terms of their getting, in addition to accrued interest, three months' interest by way of bonus.

Upon the whole case, I think the agency of Kingstone, Symons & Kingstone is established, and that the tender to them of the bill of exchange must be considered as good and sufficient, subject only to the non-payment of that bill. There is no suggestion in the case, and there was none on the argument that the bill was likely to be dishonoured.

I agree with *In re Tracy, Scully v. Tracy*, 21 A.R. 454, but this case is different. Payment in a certain way to, or through, certain persons is stipulated for, and it can hardly be said that, if the law gives to the plaintiffs the right to pay in full, the same persons who were agents before, and at the time, to receive the stipulated payments of interest and principal, are not to be deemed agents for the purpose of receiving payment in full.

The plaintiff has satisfied the onus cast upon him of shewing that the solicitors, Kingstone, Symons & Kingstone, have authority to receive, as the plaintiffs offered to pay.

As this is an application under the statute, *Brown v. Cole*, 14 Sim. 427, affirmed by *Bovill v. Endle*, [1896] 1 Ch. 648, does not apply to the extent of depriving the plaintiffs of their right to have interest cease.

There is a difficulty in giving the plaintiffs the full relief they ask. If the defendants desire to leave their money without interest upon the security they hold, all I can do is to give judgment for the plaintiffs, declaring that no further interest shall be chargeable, payable, or recoverable after the 3rd day of December, 1902, on the principal money, or interest due

under the mortgages, or upon the bond given as collateral security for payment of said mortgage on the real estate, as mentioned in the special case submitted, so long as the plaintiffs are ready to pay, and do pay, if the defendants will accept the same, the sum of £8,683 5s. 0d. tendered as stated.

If the defendants shall hereafter be willing to accept the amount as tendered, and if upon notice thereof the plaintiffs do not pay, then the mortgage shall stand to be collected or enforced as if this action had not been brought.

The defendants must pay the costs.

G. A. B.

Notice of appeal was given, but the case was subsequently settled between the parties.—Rep.

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*Discovery—Examination for—Postponement until Prior Questions Disposed of
—Fiduciary Relationship—Account—Con. Rule 472.*

The statement of claim contained a single cause of action based upon the proposition that the individual defendants, under the circumstances of the transactions detailed in it, stood in a fiduciary relation to the defendant company, which prevented them from making any profit out of their purchase of certain businesses afterwards transferred by them for a large sum to the company, and claimed an account, and payment by them of the difference between the aggregate of the price paid by them and what was paid to them. It was admitted that the individual defendants had made a large profit on the sale to the company, and the only matter really in controversy was the fiduciary relationship with the company, and their liability to account for such profit, and if liability existed, the amount for which they were answerable:—

Held (reversing the decision of Britton, J.), that discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account had been established.

THIS was an appeal to the Divisional Court by the defendant Cox from a judgment of Britton, J., affirming an order of the Master in Chambers of January 26th, 1903, requiring the appellant to file a further and better affidavit on production, and to attend at his own expense to be further examined under the circumstances set out in the judgments.

The argument before BRITTON, J., took place in Chambers on February 2nd, 1903.

W. R. Riddell, K.C., for the plaintiff.

W. H. Blake, K.C., for the defendants.

February 20. BRITTON, J.:—Unless I am prepared under Rule 472 to order that some issue or question in dispute in this case should be determined before deciding upon the right to discovery, I ought not to interfere with the order now appealed against.

It would be somewhat difficult to select any one issue or question. The plaintiff's case is apparently that, by the agreements between Cox and Ryckman with the different companies, and which were entered into at the instance of the defendants other than the Canada Cycle and Motor Co., a trust was

created in favour of a company not then in existence, but which was afterwards formed, and is now the Canada Cycle and Motor Company (Limited); and that the defendants being such trustees, must account to the company or to the other shareholders for all profits.

Then, while the action is not framed as one for deceit, and nothing is complained of in regard to false representations in the prospectus by which the plaintiff was invited to come in, the statement of claim does state, and apparently as a ground for getting something, that the meetings of the original shareholders (charter members) of the company were secret, that the proceedings were hurried, and, in short, that there was a dividing up or appropriating of profit without giving the plaintiff or the other incoming men anything; and further, that as "the defendants were interested as buyers from and sellers to themselves," and because of the fiduciary relations in which the individual defendants stood to the company at the time of these agreements, the transactions complained of were and are a fraud upon the company and the other shareholders.

I am not, therefore, prepared to select an issue and order its trial before discovery. It is true the plaintiff's action is in part for discovery; his prayer is "for a full discovery of the true price at which the said businesses were acquired, and of the sums obtained from the company in connection with the contracts mentioned in the statement of claim, and of the sums paid in connection with the same, and generally of their dealings with the company and the said five companies in connection with the said contracts." And now, before there is any trial of the action, by this examination plaintiff is about to get a part at least of what he asks.

This, no doubt, is somewhat anomalous. The plaintiff says he requires the information for the purpose of the trial; that it may be most important in determining the issues. I have considered the questions to which the plaintiff desires answers, and while the question of whether the defendants or any of them were trustees or not, does not, in my opinion, depend upon the amount paid by any of these parties to the different companies; or upon what, if anything, defendant Cox got for underwriting any of the preference shares; or what the Canada

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Cycle and Motor Co. paid, I cannot say, in view of the whole statement of claim, that the defendant ought not to answer.

These answers may, in the event of the plaintiff being entitled to recover at all, assist in the determination in the one trial just to what extent, and against whom, recovery may be had.

Without agreeing to the full extent to which the learned Master thinks the cases cited by him are applicable, either as bearing upon the plaintiff's right of action or as entitling him to discovery, I agree in the result.

The objection to answer is put wholly on advice of counsel. The defendant says he has nothing to conceal; that everything is fair and above board; but he has a right to rely upon his counsel's advice, and counsel has a perfect right to stand upon what he believes to be his strict legal rights.

This decision, upon a different state of facts and upon an entirely different cause of action from that in *Evans v. Jaffray* (1902), 3 O.L.R. 327, is not in conflict with the decision in that case.

Appeal dismissed.

Costs to be costs in the cause to the plaintiff.

The appeal was argued on March 9th and 10th, 1903, before MEREDITH, C.J.C.P., and MACLAREN, J.A.

W. H. Blake, K. C., for the appellant, contended that fiduciary relationship must be first established before the discovery sought should be granted, and referred to *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918; *Lydney & Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85; *In re Hess Manufacturing Co., Edgar v. Sloan* (1894), 23 S.C.R. 644; *Gluckstein v. Barnes*, [1900] A.C. 240; *In re Lady Forrest (Murchison) Gold Mine, Limited*, [1901] 1 Ch. 582; *In re Leeds and Hanley Theatres of Varieties, Limited*, [1902] 2 Ch. 809; *Evans v. Jaffray*, 3 O.L.R. 327.

W. R. Riddell, K. C., and W. A. Lamport, for the plaintiff, contended that the discovery was needed to shew the fiduciary relationship, and that it should be permitted now: *Orr v. Diaper* (1876), 4 Ch. D. 92; *Brown v. Wales* (1872), L. R. 15

Eq. 142. He also referred to Lindley on Companies, 6th ed., p. 43, note *q*.

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March 21. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the defendant Cox from an order, dated February 20th, 1903, made by Mr. Justice Britton, affirming an order of the Master in Chambers, dated January 26th, 1903, requiring the appellant to file a further and better affidavit on production, and to attend at his own expense to be further examined for discovery touching the matters in question in the action, and to answer all proper questions that should be asked of him, including those which he had refused to answer, in the examination had before the special examiner on November 20th, 1902, and January 7th, 1903.

Whether or not the order appealed from was rightly made depends mainly, if not entirely, upon what is the nature of the action which the respondent has brought, and what are the issues which have been raised on the pleadings.

I am unable to agree with the view of my brother Britton that there are several issues, and that it is not practicable or convenient to sever one of such issues and to direct the trial of it before discovery, as my learned brother puts it.

The case made by the respondent in his statement of claim is, I think, plainly a single cause of action based upon the proposition that the appellant and his associates as to the transactions detailed in the statement of claim, in the circumstances under which those transactions took place, stood in a fiduciary relation to the defendant company which prevented them from making any profit for themselves out of the purchase of the five businesses which were acquired by the appellant and his associates, and were afterwards transferred to the defendant company for \$4,740,000 (of which the sum of \$1,740,000 was paid in cash, and the residue by the issue of \$3,000,000 of the common stock of the company to the appellant and his associates,) a sum far in excess of the purchase prices paid by them for the businesses, and the relief claimed is an account and payment by the defendants other than the defendant company of the difference between the aggregate of

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the prices paid by the appellant and his associates and what was paid by the company to them in cash and shares.

I do not find in the pleading any allegation of false and fraudulent representations having been made by the appellant and his associates such as would form the ground of an action of deceit. It is true that it is alleged that though the nominal price paid by the appellant and his associates was \$1,397,500, the real price paid was less than that, but there is no allegation that there was any representation made as to the price which the appellant and his associates had paid for the businesses, and the contrary of this is the case made, for in paragraph 24 it is alleged that "until recently" the shareholders of the company did not know that the businesses had been bought and acquired by the appellant and his associates for a less sum than \$4,740,000, and the allegation as to the price actually paid having been less than \$1,397,500 was introduced apparently for the purpose of making it clear that the respondent did not admit that that was the sum with which the defendants, other than the defendant company, in accounting with the company should be credited as the price paid for the businesses.

The claim for a full discovery of the true price paid, followed by the claim for judgment against the defendants other than the defendant company for \$342,500—the difference between \$1,740,000 paid by the company in cash, and what is called the nominal price paid by the appellant and his associates for the businesses—and the return to the company of the \$3,000,000 common stock, makes this clear and shews that what the respondent is seeking is to make the appellant and his co-defendants, other than the defendant company, answerable as well for the payment of the difference between the nominal and the actual price paid as for the \$342,500 and the return of the common stock.

If my view as to the nature of the action is correct, there is but one issue of fact between the parties, or at most there are but two, viz., the issue as to the existence of the alleged fiduciary relationship between the appellant and his associates and the defendant company, and that as to the appellant and his associates having purchased the businesses for a less sum than they received for them from the defendant company; and

the other allegations relate to the state of the account on the footing that the liability of the appellant and his co-defendants, other than the defendant company, is established.

That the appellant and his associates received from the defendant company a sum in cash and stock far in excess of what they paid for the businesses is admitted, and the only matters really in controversy are the liability of the appellant and his co-defendants, other than the defendant company, to account for the profit made by them on the transfer to the company of the properties, and if liability be established, the amount for which they are answerable.

There is, in this view of the case, no difficulty in directing that discovery as to the details of the expenditures made by the appellant and his associates in acquiring the businesses, or consequential discovery as it is termed, should be postponed until their liability to account, which the respondent asserts has been established; nor will the respondent be prejudiced by such a course being taken; while, on the other hand, if it is not taken, and it turns out that the respondent fails to establish liability, the appellant will have been compelled to make discovery as to matters in which neither the respondent nor the defendant company has any interest.

It is, I think, the practice of the Court as a general rule to postpone this consequential discovery until liability has been established. The English rule, from which our Consolidated Rule 472 is taken, was adopted for the purpose of making uniform the practice in the cases with which it deals, which before the Judicature Act was not the same in all the Courts, and to enable the Court in any case to postpone the consequential discovery until the right of the plaintiff should be established.

Of the numerous cases in England and in this Province which determine or recognize that the practice is what I have stated it in my opinion to be, I refer to the following: *Great Western Colliery Company v. Tucker* (1874), L.R. 9 Ch. 376; *Re Leigh's Estate, Rowcliffe v. Leigh* (1877), 6 Ch. D. 256, at pp. 262, 263; *Benbow v. Low* (1880), 16 Ch. D. 93, at p. 98; *Parker v. Wells* (1881), 18 Ch. D. 477; *Vermynck v. Edwards* (1880), 29 W.R. 189; *Whyte v. Ahrens* (1884), 26 Ch. D. 717;

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 1903 (1888), 12 P.R. 467; *Graham v. Temperance & General Life*
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 v. *cliffe* (1897), 17 P.R. 586; *Sydney Cheese and Butter Factory*
 RYCKMAN. *Association v. Brower* (1900), 19 P.R. 152; *Evans v. Jaffray*,
 Meredith, C.J. 3 O.L.R. 327, at p. 341, and to *Bray on Discovery*, p. 125.

In *Leitch v. Abbott* (1886), 31 Ch. D. 374—one of the cases relied on by the Master in Chambers—Lord Justice Bowen, at pp. 377-8, states the object of the rule, which he says is perfectly clear, in these words: "It often happens that one party to an action makes an allegation of some fact, such as the existence of a partnership or an agency, which is disputed by the other party. If the allegation is true, the right to discovery would follow; if it is not true, there would be no right to discovery. The framers of the rules saw how ridiculous it would be if they did not give a power for the defendant to refuse discovery until the right of the plaintiff to have it had been established. Therefore, Rule 20 enables the Judge to sever the trial of the issue of fact from the trial of the right to discovery."

In that case it was held that Rule 20 did not apply. It was an action by a principal against his agent for an account, and the defendant was charged with fraud in dealing with himself as principal. The agency was not denied. Lord Justice Bowen held that the right to discovery arose not out of fraud but out of the relation of principal and agent, and the agency being admitted, Rule 20 did not apply.

Lord Justice Cotton based his judgment mainly on the ground that the discovery was necessary to enable the plaintiff to deliver particulars of the fraud; and Lord Justice Fry doubted whether the order of Chitty, J., which was in appeal, refusing to allow interrogatories requiring the defendant to set forth particulars of his transactions on account of the plaintiff, was not rightly made.

Elmer v. Creasy (1873), L.R. 9 Ch. 69, another of the cases on which the Master in Chambers relied, was an action by a mortgagor against his mortgagee to redeem, and the right to redeem was admitted, and the case was therefore not within the rule.

In *In re Howel Morgan, Owen v. Morgan* (1888), 39 Ch. D. 316, the case of the plaintiff was that the defendant received £6,000 in trust for her, and she sought to compel him to pay the £6,000 and the profits which, it was alleged, had been made by the investment of it. The trust was denied. It was sought to interrogate the defendant as to the income which had been derived from the investment of the £6,000, though the plaintiff did not seek to follow the investments. The interrogatory which it was sought to administer was held by the Court of Appeal to be too wide, but as the defendant did not admit that interest amounting to not less than five per cent. per annum had been received, it was held that the plaintiff was entitled to an answer to the question what amount of income was received from the £6,000 by the defendant's testator in 1873, and each subsequent year, in order that if the Court should decide the question of trust in favour of the plaintiff, she might be able at the hearing to obtain an immediate decree for the payment of the £6,000 and such interest as the Court might consider her entitled to; and upon the defendant admitting, as he did, by his counsel, that the income received from the £6,000 had not been less than five per cent. per annum, it was ordered that no further answer to the interrogatories should be given.

As has been seen from this statement, *In re Howel Morgan, Owen v. Morgan*, 39 Ch. D. 316, was a very different case from this. The object of the interrogatory was to obtain an admission from the defendant that five per cent. per annum had been earned by the fund in question in order that the plaintiff might have immediate judgment, if she established the trust for the £6,000 and interest at five per cent. per annum, and the case was therefore one within the exception to the general rule referred to by my brother Street in *Evans v. Jaffray*, 3 O.L.R. 327, at p. 341.

Lord Justice Cotton, at p. 320, refers to *Parker v. Wells*, 18 Ch. D. 477, as a very different case from the one he was dealing with; but this case, in my opinion, for the reasons which the Lord Justice gives, is more like *Parker v. Wells* than it is like *In re Howel Morgan, Owen v. Morgan*.

Two classes of questions which the appellant was, by the order in appeal, required to answer remain to be considered:

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one as to a sum of \$250,000 said to have been paid to the National Trust Company for underwriting the shares of the defendant company, and the other as to the preferred shares for which the appellant subscribed, and a discount or allowance said to have been made to him in respect of those shares.

As to the \$250,000 the appellant ought not, in my opinion, to be required to make further answer for more than one reason. The appellant on his examination answered admitting that this payment was made, and no object is to be gained by requiring him to repeat that admission, and if no admission had been made the appellant should not be required to answer. If the respondent establishes the liability of the appellant and his co-defendants, other than the defendant company, to account, and they seek to discharge themselves *pro tanto* by this payment, it will form an item in the account as to the particulars of which, for the reasons already mentioned, the appellant should not now be required to answer. If, on the other hand, the respondent seeks to charge the appellant and his associates, as directors of the company, with the \$250,000 as an unauthorized and illegal payment made by them out of the moneys of the company, no such case is made on the pleadings, and the inquiry is therefore irrelevant to the issue between the parties.

For the last of these reasons, I think that the appellant should not have been required to make further answer as to the shares subscribed for by him, or the discount or allowance said to have been made to him in respect of them.

It was argued by Mr. Riddell that the appellant should be required to answer as to certain agreements said to have been entered into by him and his associates in connection with the printing and other matters connected with the flotation of the company, and it was urged that the information which would be elicited would or might tend to support the contention of the respondent that the appellant and his associates occupied the fiduciary position towards the defendant company, upon the existence of which the respondent bases his claim to relief.

I supposed, from what was said by Mr. Riddell, that the appellant had been interrogated and had refused to answer as to these matters, but a perusal of the examination shews that

that is not the case, and there is, therefore, no ground upon which, in respect of these matters, the order could be supported if it required the appellant to submit to further examination as to them. The order does not, however, so require, nor was the application upon which it was made directed to requiring the appellant to answer as to those matters.

The reasons for which, in my opinion, the order for the further examination of the appellant should not have been made, apply to the order requiring him to make a further and better affidavit on production, and there are probably other reasons against that part of the order being allowed to stand, but it is unnecessary to enter upon any inquiry into or discussion of them.

Upon the whole, I am of opinion that the order of my brother Britton and that of the Master in Chambers should be discharged, and in lieu of the order of the Master in Chambers an order should be made dismissing the application made to him by the respondent, and that the costs here and below should be costs to the appellant in any event.

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April 28.

PUTERBAUGH V. GOLD MEDAL COMPANY.

Defamation—Libel—Privilege—Publication—Stenographer.

The fact that the manager of a company had in the ordinary course of the correspondence of the company handed to his stenographer, to be type-written by him, a draft letter containing defamatory statements, but of a privileged nature, does not amount to such publication as takes away the privilege.

THIS was a motion by the defendants to set aside a verdict for the plaintiff in an action for libel and for a new trial, or to have a verdict entered for the defendants, upon the grounds that the verdict was against the evidence, that the Judge should have ruled that the occasion was privileged, that there was no publication of the alleged libel, and that there was no evidence to connect the defendants, the company, with the alleged libel.

The plaintiff was employed by the defendants, the company, and the defendant Abra was acting manager of one of the departments of their business. He discharged the plaintiff for misbehaviour, and was informed a day or two afterwards that the plaintiff when leaving had taken away with him certain patterns belonging to the company. Thereupon he drafted a letter to the plaintiff demanding their return, pointing out that their removal was a theft, and threatening prosecution if they were not returned. He gave the draft letter to a clerk, who wrote it out on a typewriter, and sent it to the plaintiff. This was the only publication of the letter.

The defendants, the company, denied that the letter was written with their authority.

The defendant Abra pleaded in effect that the occasion was privileged and that the letter was written without malice, and that the statements in it were true.

The action was tried at the Toronto Winter Assizes, 1903, before MacMahon, J., and a jury, and a verdict was returned for the plaintiff for \$300.

The defendants moved for a nonsuit or for a new trial, and the motion was argued on April 16th, 1903, before STREET and BRITTON, JJ.

F. C. Cooke, for the defendants, contended that there was no publication, and that if there was, the occasion was privileged; that it cannot be said that when two servants in discharge of their joint duty draw up a letter, there is publication to a third person: *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524, 529; *Harper v. Hamilton Retail Grocers Association* (1900), 32 O.R. 295; *Lawless v. The Anglo-Egyptian Cotton and Oil Co.* (1869), L.R. 4 Q.B. 262, 269; *Boxsius v. Goblet Frères*, [1894] 1 Q.B. 842; and that there was no authorization, express or implied, by the company to the foreman to write a libellous letter.

F. E. Jones, for the plaintiff, relied, as to the question of privilege, on *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524; and as to the liability of the company, referred to *Whitfield v. South Eastern R.W. Co.* (1858), E. B. & E. 115; *Nevill v. Fine Arts and General Insurance Co.*, [1895] 2 Q.B. 156, 160. He also cited *Hargreaves v. Sinclair* (1882), 1 O.R. 260.

April 28. STREET, J.:—There can be no doubt that the occasion of the writing of the letter complained of was a privileged occasion. Abra was in charge of the department in which the plaintiff was employed in the company's works, and having been informed that the plaintiff had taken away certain property of the company without leave, he wrote him demanding its return, pointing out that the removal of it was a theft, and threatening him with prosecution if it were not at once returned. In writing a letter and demanding a return of the property taken, he was clearly performing a duty he owed to the company, and if the letter were written without malice, no action would lie in respect of it.

My brother MacMahon appears, however, to have ruled that the publication of the letter, which occurred when Abra handed the draft of it to his typewriter, did not come within the privilege, and took it away, upon the authority of *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524.

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The later cases upon the question have, however, introduced distinctions which have cut down to narrow limits the effect of that decision; and the case of *Boxsius v. Goblet Frères*, [1894] 1 Q.B. 842, is authority for the position that the publication by Abra to his typewriter in the ordinary course of the correspondence of the company did not take away the privilege, but was entirely consistent with its existence.

The result of this ruling seems to have been that the case went off upon the question of the authority of Abra to write the letter and his plea of justification, and that the defence of privilege was not gone into.

I think it is clear that the defendants should not have been deprived of the benefit of this defence, and that they should have the opportunity of raising it upon a new trial. The defendants, the company, it is true, have not pleaded it, but the plaintiff's case against them is founded upon the assertion that they authorized Abra to write it, and the jury have so found, and if this finding is correct, the privileged occasion pleaded by Abra should be a protection to them. In order to save complication, they should have leave, if they see fit, to amend their pleadings by pleading privilege. I think there was evidence to go to the jury sufficient to sustain the finding that the letter was their letter, and they are, therefore, not entitled to the nonsuit for which they ask on that ground.

The judgment for the plaintiff should, therefore, be set aside without costs, and a new trial should be ordered without costs, with leave to the defendants, the company, to amend if so advised, by setting up that the occasion of the writing of the letter was privileged.

BRITTON, J.:—The questions which arise are :—

1. Publication.
2. Was the occasion privileged? and
3. The authorization by the company of Abra to write the letter complained of.

The only publication was to one Howitt, a typewriter, in the employ of defendant company. Technically, that is publication upon the authority of *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524; and that case decides that in such publication the

occasion is not privileged. See also the report of the trial of the present case, 1 O.W.R. 250.

Later cases shake *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524, on the question of privilege, and go the length of shewing that the writing of this letter by Abra was on a privileged occasion. Assuming that Abra was acting in good faith, a duty was imposed upon him to take some action in reference to the plaintiff, and writing such a letter was a reasonable thing to do. Abra and Howitt had a common interest in protecting their master's property. If the occasion was privileged as to Abra, it was equally so as to Howitt, and would apply to Abra's getting the assistance of his fellow-employee to make a copy of the letter.

It is within the rule, of directors in the same company, masters in the same school, and arises from the joint performance of a duty either imposed by law or resulting from moral obligation: see *Lawless v. Anglo-Egyptian Cotton and Oil Co.* (1869), L.R. 4 Q.B. 262; *Harper v. Hamilton Retail Grocers Association* (1900), 32 O.R. 295.

If the occasion was privileged, then it was so as to the company, if there was authority by the company to Abra to write the letter.

I think there should be a new trial, so that the question of privileged occasion should be properly dealt with. See, also, *Nevill v. Fine Arts and General Insurance Co., Ltd.*, [1895] 2 Q.B. 156.

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[IN THE COURT OF APPEAL.]

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May 18.

UFFNER V. LEWIS (No. 2).

BOYS' HOME V. LEWIS (No. 2).

Interest—Overpayment of Legacies—Executors and Administrators—Will.

A testator by his will gave to two trustees his estate real and personal and directed the trustees to pay, (1) to a sister a legacy of \$500, and in case of her death to her daughter, and in case of the death of the daughter to the daughter's children in equal shares; (2) to a niece a legacy of \$500; (3) to the children of another niece a legacy of \$500; and (4) to a charitable institution a legacy of \$500; with a direction that should there not be sufficient to pay all the legacies there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions":—

Held, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each.

Judgment of Moss, J.A., 3 O.L.R. 208, affirmed.

Proceedings were taken in the year 1882 for the administration of the estate, and without, as was held in the previous judgment of this Court, 27 A.R. 242, proper proceedings being taken whereby they might have been bound, the children of the niece were ignored and their legacy and their share in the residue were divided between the charitable institution, the trustees, and one of the other legatees:—

Held, that the trustees and the charitable institution were bound to re-pay the excess which they had received, with interest from the date of proceedings taken by the children of the niece.

Per MACLENNAN, J.A., dissenting: Interest should be allowed from the date of distribution under the report in the administration proceedings.

Judgment of Moss, J.A., 3 O.L.R. 208, reversed.

THIS was an appeal by the Uffners, plaintiffs in the first case and petitioners in the second case, from the judgment of Moss, J. A., reported 3 O.L.R. 208, upon an appeal from the report of the Master at Hamilton upon the taking of the accounts directed by the former judgment of this Court (27 A.R. 242), and was argued before OSLER, MACLENNAN, and GARROW, JJ.A., on the 8th and 9th of May, 1902.

D'Arcy Tate, for the appellants.

Teetzel, K. C., and *A. M. Lewis*, for the respondents, the Boys' Home.

Shepley, K.C., and *William Bell*, for the respondents, Lewis and Morgan.

F. W. Harcourt, for the infant respondents.

Two questions were involved in the appeal: the first, whether the petitioners, who were the children of Sarah Uffner

named in the will, were entitled each to one-ninth of the estate, or only to one-fifth of the estate to be divided between them; and the second, whether under all the circumstances the executors, Lewis and Morgan, and the Boys' Home, were liable to pay interest on the amount retained by and paid to them respectively in excess of the amount properly payable. Upon the question of the construction of the will the following authorities were referred to: *Tyndale v. Wilkinson* (1856), 23 Beav. 74; *Houghton v. Bell* (1891), 23 S. C. R. 498; *Butler v. Stratton* (1791), 3 Bro. C.C. 367; *Northey v. Strange* (1716), 1 P. Wms. 340; *Blackler v. Webb* (1726), 2 P. Wms. 383; *Weld v. Bradbury* (1715), 2 Vern. 705; *Williams v. Yates* (1837), 1 Jur. 510; *Hyde v. Cullen* (1837), 1 Jur. 100; *Lenden v. Blackmore* (1840), 10 Sim. 626; *Tomlin v. Hatfeild* (1841), 12 Sim. 167; *Payne v. Webb* (1874), L. R. 19 Eq. 26; *Dowding v. Smith* (1841), 3 Beav. 541; *Rickabe v. Garwood* (1845), 8 Beav. 579; *Amson v. Harris* (1854), 19 Beav. 210; *Wood v. Armour* (1886), 12 O. R. 146; Jarman, 5th ed., p. 1051; *In re Smith's Trusts* (1878), 9 Ch. D. 117; *Stewart v. Sheffield* (1811), 13 East 526; *Kingsbury v. Walter*, [1901] A. C. 187; *Leigh v. Leigh* (1854), 17 Beav. 605; *In re Campbell's Trusts* (1886), 33 Ch. D. 98; *Capes v. Dalton* (1902), 86 L.T.N.S. 129; *Davis v. Bennett* (1862), 4 DeG. F. & J. 327. And on the question of interest: *Re Spencer* (1869), 21 L. T. N. S. 808; *In re Evans Estate*, [1876] W. N. 205; *Davidson v. Boomer* (1870), 17 Gr. 509; *London Chartered Bank v. White* (1879), 4 App. Cas. 413; *McLennan v. Heward* (1862), 9 Gr. 178; *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18; Williams on Executors, 9th ed., p. 315; *In re Gosman* (1881), 17 Ch. D. 771; *In re Ross* (1881), 29 Gr. 385; *Booth v. Coulton* (1861), 2 Giff. 514; *In re Kirkpatrick, Kirkpatrick v. Stevenson* (1883), 10 P. R. 4; *Barber v. Clark* (1890), 20 O. R. 522, (1891), 18 A. R. 435; *Chamberlain v. Clark* (1882), 1 O. R. 135, (1883), 9 A. R. 273; *Hope v. Beatty* (1876), 7 P. R. 39; *Woodruff v. Canada Guarantee Co.* (1881), 8 P. R. 532; *Webster v. British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169.

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May 18. OSLER, J.A.:—I agree with the judgment of the Court below as to the principle of distribution, and with the

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reasoning on that point of my brother Maclellan, whose judgment I have had an opportunity of reading. The appeal was remarkably well argued, if I may say so, on both sides, and I have given the arguments presented by counsel the attention they deserve. I have also read the authorities, or all the important authorities, cited, and am satisfied that the result which has been arrived at as to the intention of the testator, ascertainable from the language he has employed—and it is his will which is to be construed, not those dealt with in other cases—is not in conflict with any rule or principle established by or deducible from those cases.

As to the liability of the executors Lewis and Morgan, and the Boys' Home, to pay interest on the amounts received or retained by them in excess of what they were entitled to under the will, I can see no just reason why they should not be ordered to pay interest thereon, at least from the commencement of the action (I think the 9th of November, 1895). The authorities cited by my brother Maclellan justify, if they do not imperatively require, at least that measure of relief. But I am of opinion that, under the peculiar circumstances of the case, they do not oblige us to penalize these defendants by adopting the severer course of charging them with interest from 1882 or 1883, or the date of the decree, or of the Master's report in the administration action.

To the extent I have mentioned I would vary the judgment, and dismiss the appeal in other respects.

Success being divided, we may properly leave the parties respectively to bear their own costs of the appeal.

MACLENNAN, J.A.:—The first question in this appeal is whether the Master was right in his ruling that, upon the true construction of the testator's will, the children of his niece, Sarah Uffner, are entitled to share the ultimate residue or remainder of his estate as a class, and not as individual legatees. In the one case they would be entitled to one-fifth to be divided between them equally, and in the other to five-ninths, or one-ninth for each.

The bequest is contained in the tenth clause of the will, and is as follows: "And should there ultimately be any residue or

remainder of my said estates after paying the legacies and debts and doings as aforesaid, I direct my said trustees, or the survivor of them, to divide and pay the same to and among my legatees hereinbefore named and referred to (with the exception of Margaret Sullivan), and my said trustees, or the survivor of them, in even and equal shares and proportions."

I think it must be conceded, as is fairly and fully conceded by counsel for the respondents, the Boys' Home, that if the question depended on the tenth clause alone, it must be decided that the appellants are entitled to the larger shares which they claim, and that each of them is entitled to one-ninth.

After much consideration, and not without a good deal of doubt, I have formed the opinion that there is enough in other parts of the will to require the clause to be construed otherwise, and as giving the appellants only a fifth share to be divided between them.

By the first clause of the will the testator gave the most valuable part of the estate to his adopted son John, upon his attaining the age of twenty-five years, directing his maintenance, education and support to be provided for in the meantime out of the rents and profits of the land so devised to him; and although he provides that, in case of his death before attaining the age of twenty-five years (an event which actually occurred), the land devised to him should fall into the residue, it is evident his expectation was that John should live to enjoy the property devised to him, and that it was only the remainder that would be available for distribution among his blood relations and the Boys' Home.

He then by clause three gives \$500 to his sister, Rachel Evans, and in case of her death the same to be paid to her daughter, and in case of the daughter's death, to the daughter's children in equal shares. By clause four he gives \$500 to his niece Mary, daughter of his deceased brother David. By clause five he gives \$500 to "the children of Sarah Uffner," another daughter of his brother David, "in even and equal shares;" and by clause seven he gives \$500 to the Boys' Home. Then by clause eight he directs these legacies to be paid as soon after his death as convenient, without undue sacrifice, and that "should it be found that there will not be sufficient of my

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estates (other than John's) left to pay or satisfy all the said legatees their legacies aforesaid in full," each of their said legacies should be reduced and paid in proportion to the value of the remainder of his residuary estates. And by clause nine he charges all his property with his debts and funeral and testamentary expenses.

This clause eight shews that the testator considered it a possible event that his estate, not including the devise to John, might not be sufficient to carry out his intentions for the benefit of his relations and the Boys' Home. And the previous bequests indicate clearly the proportions in which he intended his relations and the other objects of his bounty to be *certainly* benefited by his estate. Those bequests were, in his estimation, the measure of their respective claims upon his bounty. His sister Rachel was to have only one share, and in the event of her death her daughter was to take her place, and in case of the daughter's death, her children, no matter how many, were to have that one share and no more. His niece Mary was to have one share; the appellants, children of his niece Sarah Uffner, were to have one share; and the Boys' Home was to have one share. That was the scheme of the will. Those were the proportions in which he intended to benefit his relations at all events. He has given no legacy up to this point to his executors and trustees. If there was not enough, or not more than enough, to benefit his relations and the Boys' Home to the extent and in the proportions thus defined, there was to be no gift to his executors.

He then provides for the case of there being something still left after payment of debts and expenses and the distribution already provided for, and does it by clause ten, and he directs it to be divided among the same persons, his "legatees hereinbefore named and referred to" and his "trustees, or the survivor of them, in even and equal shares and proportions." His previous legacies were given in four equal shares and proportions in a very obvious sense, and he has now added a fifth share, which he gives to his trustees. I think those are the shares, and that is the equality which he meant to express, and which is expressed, although unfortunately not so clearly as might have been done. If we were to hold that each of the

appellants was entitled to a full share, then if the testator's sister Rachel and her daughter had both been dead, the latter leaving a large family, we must equally have held each of them entitled to a full share—a construction which would, in my opinion, do violence to the testator's intentions for the benefit of his relations and the charity in which he was interested. By the actual division and distribution of what he considered might possibly be a disposition of the whole of his estate made by the testator himself, he has shewn what he meant by a division and payment to and among his legatees named and referred to in even and equal shares and proportions, and has thus provided a key to the construction of the tenth clause.

Upon the whole, therefore, I think the appeal on the question of distribution must be dismissed.

The other question in this appeal is whether the Boys' Home or the executors are chargeable with interest on what they have received in excess of their respective shares, which they have been ordered to repay. The judgment has ordered each of them to make good and repay such part of the sums respectively received by them as their shares of the residue of the testator's estate in excess of what they were respectively entitled to, together with such interest, if any, with which upon the reference they may be found chargeable. The judgment also directed the Master to ascertain the persons entitled to shares of the residue of the testator's estate, namely, the sum of \$16,531.71, and in what proportions, and to inquire and state whether the Boys' Home or the executors, or either of them, is liable to pay interest on the sums which they may be found liable to repay.

The Master certified that neither the Boys' Home nor the executors are liable to pay interest on what they have received in excess of their respective shares, and his certificate has been affirmed on appeal by Moss, J.A., in single court.

My learned brother's judgment proceeds upon three grounds, principally and mainly on the ground that it is the rule of the Court that a legatee who has been overpaid, and is ordered to refund, is not chargeable with interest; secondly, that the respondents received overpayment without fraud or mis-

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conduct; and thirdly, that it was received and retained under the authority of a judgment of the Court.

With regard to the last ground I think it is sufficient to say that, inasmuch as the appellants were not parties to the proceedings under which the judgment referred to was obtained, their rights cannot be affected or impaired by it. I discussed this point fully on the former appeal in this case (27 A.R. 242, at pp. 247, 8, 9), and I do not think it necessary to refer to it further. As was there pointed out, none of the proceedings authorized by statute, or prescribed by the rules of practice, by which the appellants might have been notified of, or might have been bound by, what took place in the Master's office, or by the subsequent order of the court, were taken, although the appellants were named in the will, and although their existence was not at any time doubted.

Nor do I think the second ground can be regarded as sufficient to deprive the plaintiffs of interest, if otherwise entitled to it. I do not think that fraud is necessary to make a person liable to interest on money which he has improperly received; and I am of opinion that there was in this case what must be regarded as misconduct. Both of the respondents received, and have for a long time retained, money belonging to the appellants, without any just claim of right, and with full knowledge of the rights of the appellants, the only excuse being that they could not be found. If that was not a proper thing to do, it ought to be called misconduct.

The testator made his will in April, 1879, naming certain persons, including the appellants, and his niece Mary Evans, residuary legatees. He died in April, 1880, and the executors proved the will a few days afterwards, and immediately realised the estate. They took the position that the Boys' Home was not a residuary legatee at all, and was only entitled to the legacy of \$500; and that each executor was entitled to a share of the residue, and not merely to one share between them. On this theory they paid the Boys' Home and Rachel Evans their legacies of \$500 each, and the legacy of Margaret Sullivan of \$100, and reserved the \$500 legacies of Mary Evans and the appellants. This left a residue of \$15,147, and one-fifth of this, or \$3,029.40, each of them appropriated to himself

as his share; in two sums: one of \$1,047.62 on the 17th June, 1881, and another of \$1,981.78 on the 8th of April, 1882. They also, on the same days, made payments, together amounting to \$3,029.40, to Rachel Evans, in addition to her legacy of \$500. They thus retained in their hands, as it was their duty to do, two sums of \$500 each to answer the appellants' and Mary Evans's legacies of \$500 each, and also \$6,058.80 to answer the shares of the appellants and Mary Evans in the residue. At this time they had no doubt of the existence of the appellants and Mary Evans, so recently named by the testator in his will. They made search and inquiry for them, but did not find them, and because they did not know where they were, and could not find them, they afterwards appropriated parts of the shares of those legatees to their own use. In consequence of their denial of the right of the Boys' Home to a share of the residue, that institution brought this action. It does not appear when it was commenced, but the judgment was pronounced on the 18th of November, 1882, more than seven months after the executors had already appropriated to themselves \$6,058.80 as their share of the residue, a sum considerably larger than was afterwards awarded to them by the Master. The judgment affirmed the right of the Boys' Home to a share of the residue, and besides directing an administration of the estate, ordered that all balances found due from the executors should be paid into Court. This part of the judgment was never complied with, and as late as the 5th of February, 1883, Morgan, in his deposition in the Master's office, says: "We have received and hold as our own, as we claim, \$3,029.40 for each of us, being \$6,058.80 between us, on account of our share of the estate." When that judgment was rendered, and that order for payment into Court was made, they had the legacy of \$500 and the share of residue belonging to the appellants and to Mary Evans in their hands, and if they had obeyed the order of the Court, and had paid the money in, the Court would have protected the interests of the appellants, who were described in the will as children, and who were in fact at the date of the judgment all infants but one. I think the plaintiffs, the Boys' Home, who had the carriage of the proceedings, are as responsible for this non-compliance with the

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judgment of the Court, and for not requiring that the money should be paid in, as the defendants, the executors. In the Master's office the executors claimed two shares of the residue, as we have seen, instead of one share between them. The Master disallowed their claim to two shares, and allowed them only one share between them, which was affirmed on appeal; but he strangely allowed the legacies and shares of the appellants and Mary Evans to be divided between the executors and the Boys' Home and Rachel Evans, one share to each. It is difficult to understand how the Master could have been induced to do this, to sanction the appellants' property being paid over to other persons merely because it was not known where the persons to whom it belonged were to be found. It must have been obvious to the solicitors, and to the parties themselves, that they had no more right to this money than to the goods of any of their neighbours. The case came before the Court on further directions, when an order was made, evidently *per incuriam*, for payment according to the report. The judgment, indeed, is silent as to any payment to, or retention by, the executors of the share allotted to them by the report, but that is immaterial, for the report, which made the allotment, is expressly confirmed. The Court might well have overlooked the rights of the absent legatees, not having the will before it, but it is difficult to understand how any counsel for either plaintiffs or defendants, of experience in administration matters, should have failed to call attention to them, in which case no order would ever have been made other than the bringing of their shares into Court. The present case, therefore, is not one of the receipt of a legacy, and the subsequent discovery that it ought not, or that part of it ought not, to have been received, having regard to the rights of other parties. Such was the case of *Gittins v. Steele* (1818), 1 Swans 24, 200, before Lord Eldon, referred to in Williams on Executors, 9th ed., p. 1315, and by my brother Moss. In that case the will gave a legacy of £7,000, payable out of certain estates only. The testator afterwards sold part of those estates, so that they were insufficient to pay the whole legacy. The executors, thinking the legacy chargeable on the personal estate generally, paid it nearly in full, and Sir John Leach, holding that such

was the true construction of the will, allowed the payment as having been properly made. This judgment was reversed by Lord Eldon on appeal, and the legatee was ordered to refund, with interest at four per cent., Lord Eldon saying: "If a legacy has been erroneously paid to a legatee, who has no farther property in the estate, in recalling that payment I apprehend the rule of the Court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share." That was a case of a perfectly innocent receipt of money, to which the legatee had every reason to believe he was entitled, and yet he had to pay interest, not directly, but out of another fund to which he was entitled, in order that *justice might be done*. Having regard to the case which was before him, I do not understand Lord Eldon to lay down a rule that in no case will an executor be made to refund a payment erroneously made to him, with interest, no matter what the circumstances might be under which it was received.

Jervis v. Wolferstan, L. R. 18 Eq. 18, also referred to in Williams, and by my brother Moss, is also very different from the present. There, executors of a testator who held shares, fully paid up, but in an unlimited company, paid the debts, and the residue to the residuary legatees. Afterwards the company, which had previously been in good credit, failed, and the executors were obliged to pay a large sum in respect of the shares. It was held that the executors had acted properly in paying the residue to the legatees, notwithstanding the remote contingent liability on the shares, and that while the legatees must refund, it should be without interest. This, again, was a case of money innocently and properly paid and received.

Barber v. Clark, 20 O.R. 522, affirmed in this Court, was a case of a series of payments of interest upon a legacy, made by mutual mistake, in advance of the prescribed times of payment, and it was held that the plaintiff should not be charged interest for receiving premature payment.

How different is the present case? The defendant Lewis gave the following evidence at the trial: "Did you suppose he was leaving this property to persons that were dead? I didn't suppose so for a moment; I didn't say they were dead. You

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didn't know whether they were dead or not? I didn't say they were dead; I never supposed they were dead. Then he knew at all events that his niece Sarah was dead? Oh, yes, he knew she was dead before; he couldn't find her. Did he tell you he knew that, or when he found it out? No, he did not. But of course he knew it, because he left the property to her children? Yes. And you therefore of course, as you say, supposed these children were alive? Yes, I supposed they were alive. You had no reason to suppose they were dead? No, I had not. The difficulty was where to find them? Yes. Did you ever ask that their share should be paid into Court; you say you opposed the distribution? We opposed the distribution. If they were not dead, you could not tell when they would turn up? No, we could not. Their money ought to have been paid into Court; why wasn't it? Simply the thing was taken out of our hands. If the thing had not been taken out of our hands we would still have continued our search and retained the money for them. Had you a lawyer employed? Yes. What course did you wish to take with reference to the dividing up of the estate? The first trouble was as to the Boys' Home; their right to get any out of the estate beyond the \$500, and they issued a writ. I know, but about dividing up the share of Sarah Uffner? We didn't hear anything of that until two or three meetings had been held. Then the first I heard of it was from Mr. Morgan. I met him on the street, and he said they are now going to divide the whole estate up. Well, I said we will oppose that, and he said we will, and we did. You opposed the division? Yes."

With the clearest knowledge, therefore, that the money in question did not belong to them but to the appellants, and so convinced of that, that they opposed the division, these executors allowed it to be divided between themselves and other parties without calling the attention of the Court to the facts, and they received, and have retained, the shares so received by them ever since. The fact that they opposed the division shews their consciousness and knowledge of the appellants' claims, and the impropriety of dividing their shares among the other parties. And their opposition must have been easily overcome, for it is not shewn how or where or when their opposition was urged or manifested.

Now, not only was it the duty of the Master to have found the appellants and Mary Evans entitled to their legacies, and to have so reported, but the duty of the solicitors, both of the plaintiffs the Boys' Home, and of the executors, to see that he did so, and to have had their shares paid into Court. It was also their duty to have called the attention of the Court to the claims of the appellants; and if that had been done, the Court would have directed their shares to be paid in, in which case they would have been kept safely for them, and would have been bearing interest. The law of the Court is well known with regard to the legacies of absent legatees, and the shares of absent next-of-kin. They are ordered into Court, and accumulated for the benefit of the persons entitled. In *Bailey v. Hammond* (1802), 7 Ves. 590, the case of a legatee who survived the testator, but had not been heard of for twenty years, payment was made to his next-of-kin after twenty years, on his giving a recognizance to refund. In *Dowley v. Winfield* (1844), 14 Sim. 277, one of two sons, sole next-of-kin of their father, disappeared twenty months before his father's death, and was not afterwards heard of. Eleven years after the death the Court ordered payment of his share to his brother, on his giving security to refund if required, with four per cent. interest. See, also, *Cuthbert v. Purrier* (1847), 2 Ph. 199, where a similar order was made. These cases shew the care and caution used by the Court in the case of legatees or next-of-kin who are absent or have not been heard of for a long time; and I think the executors and the Boys' Home are both responsible for the neglect of themselves and their solicitors in appropriating to themselves and paying to Rachel Evans the legacies and shares of the residue belonging to Mary Evans and the appellants.

I think it follows that the appellants and Mary Evans are entitled to interest. The well-known rule of law is that pecuniary legacies carry interest from the end of a year after the death of the testator. Therefore, for the purpose of ascertaining the amount of the residue at the time of the division, the two unpaid legacies of \$500 must have interest added for a period of nearly two years. The other two \$500 legacies were either paid at the end of the year, or were paid with interest,

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and therefore, for the purpose of ascertaining what was due to the appellants at the time of the division, nearly two years' interest must be added to their legacy and that of Mary Evans of \$500 each. The amount of the residue will thus have to be restated, and divided into fifths, for the purpose of ascertaining the proper amount of the shares of the parties at the time of the division. The Master's certificate is merely that no interest is payable either by the executors or the Boys' Home, and it may be that it was not intended to deny the propriety of interest being allowed on the two legacies of \$500 each for the purpose of restating the account of the residue. It seemed to me, however, not improper to call attention to it.

Having shewn, as I think I have done, that the appellants' legacies were appropriated by the respondents with full knowledge, and without any shadow of right, I think it follows that they are liable to repay it with interest. The right of the appellants to interest is clear and undisputed on the \$500 legacy from the end of one year, and on the residue from the time it was ascertained or ascertainable.

In *Gittens v. Steele*, 1 Swans. 24, Lord Eldon declared the repayment *with interest* to be required by *justice*. The respondents ought, therefore, to pay interest unless they can shew some sufficient excuse. The burden is upon them, and I think they have not relieved themselves from it. The executors were trustees. They were expressly made trustees by the will, and they appropriated trust funds to their own use. The Boys' Home also knowingly appropriated trust funds, and thereby made themselves quasi-trustees, with a corresponding liability.

In *Re Spencer*, 21 L.T.N.S. 808, a wrong order was obtained by a solicitor for payment of money out of Court, on a representation made, with apparent *bona fides*, but which, with reasonable diligence, he could have found to be untrue, and the money was ordered to be repaid with interest.

In *Re Evans*, [1876] W.N. 205, some of the next-of-kin of an intestate had money in their hands for ten years, claiming *bona fide* that they were entitled to it. Hall, V.-C., in an action by another next-of-kin claiming a share, ordered payment with interest from the time the money was received.

In *Re Dewell* (1868), 4 Drewry 269, an intestate left an estate of £2,000, and it was supposed there was no next-of-kin. The Crown nominated the Crown solicitor to take out administration, which was done, and in 1828 the administrator paid over the fund to the King's proctor for the use of His Majesty. Thirty years afterwards certain persons brought suit, and established their claims to the estate, and Kindersley, V.-C., ordered the money to be refunded by the Crown, with thirty years' arrears of interest. See, also, *London Chartered Bank of Australia v. White*, 4 App. Cas. 415.

In the present case the executors were wrong, and ought to have known, and confessedly did know, they were wrong, to take and keep the appellants' money; and that being so, I think on well settled principles of equity they are liable for interest. I think the Boys' Home are also liable, for they or their solicitors knew, or ought to have known, that they had no right to receive it. No doubt, as pointed out by Kindersley, V.-C., in the case last cited, if the appellants had been made parties to the action, the Master's report and the order of the Court, however erroneous, so long as they stood, would have protected them; but so far as the appellants are concerned, that report and order are of no effect.

The further questions are the rate of interest and the time for which it should be allowed.

The Act of 1900, reducing the rate of interest from six to five per cent. is not applicable; for the liability existed before that date, and so the rate must be six per cent.

As to the time, I do not see why it should not at least run from the commencement of the appellants' proceedings. I should have thought that, in such a case as the present, a matter of course.

But I am of opinion that interest should run from the time of the division in 1883.

This is not the case of an action recently brought to recover the appellants' legacy, but is a proceeding under an administration judgment made in 1882, which virtually then ordered payment to be made, inasmuch as it ordered the final winding-up of the estate of the testator and the adjustment of the rights of all parties interested. If the appellants' shares had been

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paid into Court at the proper time, the amount would have considerably more than doubled during the time which has elapsed. I see no principle on which we could limit the claim to any later date. There has been no laches or acquiescence by reason of which we could limit the interest to six years' arrears, as was done in *Thomson v. Eastwood* (1877), 2 App. Cas. 238-241.

The appeal on the question of interest ought, therefore, to be allowed, and the defendants should be charged with interest from the date of the distribution.

GARROW, J.A. :—I agree with my brother OSLER.

R. S. C.

[IN THE COURT OF APPEAL]

RE CARTWRIGHT PUBLIC SCHOOL TRUSTEES AND TOWNSHIP
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Public Schools—Selection of School Site—Trustees—Ratepayers—Difference—Award—Invalidity—Mandamus—Estoppel.

By sec. 31 of the Public Schools Act, R.S.O. 1897, ch. 292, the trustees of every rural school section shall have power to select a site for a new school house or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of the ratepayers of the section to consider the site selected. By sub-sec. 2, in case a majority of the ratepayers present at such special meeting differ as to the suitability of the site selected by the trustees, each party shall choose an arbitrator, etc. :—

Held, that it is only in case of a difference between the trustees, on the one hand, and a majority of the ratepayers at a special meeting, on the other, as to a school site *selected* by the trustees, that an arbitration is to be had.

And where a majority of the ratepayers at a special meeting voted in favour of a change of school site, without any selection of site having been first made by the trustees :—

Held, that there was no foundation for an arbitration, and that an award made by arbitrators appointed in the manner prescribed by sub-sec. 2, whether such award was or was not valid on its face, was an absolutely void proceeding, and no answer to a motion by the trustees for a mandamus to the township corporation requiring them to pass a by-law for the issue of debentures to provide funds for the purchase of a school site and the erection of a school house, in pursuance of the vote of the ratepayers.

Quere, whether the award was valid on its face, inasmuch as it did not shew a difference between the trustees and the ratepayers.

Held, also, that there could be no estoppel against the applicants, or waiver of the public right.

Judgment of a Divisional Court, 4 O.L.R. 272, affirmed.

APPEAL by the corporation of the township of Cartwright from the decision of a Divisional Court, 4 O.L.R. 272, allowing an appeal by the board of public school trustees for school section 5 of the township, from an order of Falconbridge, C.J.K.B., in Chambers, dismissing a motion by the board for an order for a mandamus to the appellants requiring them to pass a by-law for the issue of debentures for \$1,000 for the purpose of the purchase of a school site and the erection of a school house thereon, and to issue the debentures as they should be required by the appellants.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 12th December, 1902.

A. B. Aylesworth, K.C., for the appellants. An award upon the question of school site is binding upon the ratepayers and

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trustees for five years. The demand of money to buy a new school site is in contravention of the award and of R.S.O. 1897, ch. 292, sec. 31, sub-sec. 3. The award is good upon its face, and estops the trustees from taking any steps as to the selection of a site, and from asking money therefor. If the award is valid, the municipal council should not pass the by-law, as the application of the trustees is not the application required by sec. 70, sub-sec. 1, of the Act. It is not for the council to inquire whether the award is valid or invalid. The council, being no party to the award, should not be compelled to support it; the question of its validity or invalidity should arise only upon an original application and between the parties to the award. When there is no objection on the face of an award, an action to set it aside is necessary: *Dick v. Milligan* (1792), 2 Ves. Jr. 23. But the award is valid, any defect being cured by both parties appointing arbitrators and submitting to the jurisdiction: *Maisonneuve v. Township of Roxborough* (1899), 30 O.R. 127; *Clish v. Fraser* (1895), 28 N.S. Rep. 163. The demand of the trustees upon the council was insufficient because it contained no estimates for the required expenditure: *Re Sandwich School Trustees and Town of Sandwich* (1864), 23 U.C.R. 639, 642, 643; *Re Mount Forest School Trustees and Village of Mount Forest* (1869), 29 U.C.R. 422; *London Board of Education v. City of London* (1901), 1 O.L.R. 284. The school board in effect adopted a site, and adopting is the same as selecting. There is no minute of a resolution of the board adopting a site, but the members agreed (this is not contradicted by the affidavits), and the decision was announced to the school meeting, otherwise there would not have been the vote in favour of the change.

W. R. Riddell, K.C., for the school trustees, the respondents. The proposal for a change of site having been submitted to and sanctioned by a special meeting of ratepayers, it becomes the duty of the council to pass the by-law: *Re Napanee Board of Education and Town of Napanee* (1881), 29 Gr. 395, and cases there cited. The sole duty of the council was to see that the proposal had been duly submitted and sanctioned, and that the application was properly and regularly made. If they are to consider the award, they must determine whether it affords a

valid reason for not doing their statutory duty. The history of the legislation shews a change in policy. It is now the duty first of all of the school trustees to select a site, and this they did not do. The Court below is right in holding that the case does not come within sec. 31; but, if it does, then the first thing should be a selection of a site by the board. There was no meeting of or act by the trustees as such. The minutes must govern: *D'Arcy v. Tamar R.W. Co.* (1867), L. R. 2 Ex. 158; R. S. O. 1897, ch. 292, secs. 14 (6), 18, 19, 62 (2); Dillon on Corporations, sec. 200. There being no selection and no act of the trustees, there can be no arbitration, and the whole proceedings are void: *Re Martin and County of Simcoe* (1894), 25 O.R. 411; *Union School Section v. Lockhart* (1895), 26 O. R. 662; *Nicol School Trustees v. Maitland* (1899), 26 A.R. 506. The whole facts should be inquired into on application for mandamus: 13 Am. & Eng. Encyc. of Law, p. 23. The provisions being statutory, there can be no waiver: cf. *Re Martin and County of Simcoe*, 25 O.R. 411. An estimate is not required when a demand for a by-law and debentures is made. The legislation with regard to estimates concerns only the general school expenses. The onus is on the council to shew a valid award.

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April 14. The judgment of the Court was delivered by GARROW, J. A.:—The facts involved in this appeal are sufficiently stated in the judgment of the Divisional Court, in 4 O.L.R. 272.

By sec. 62 of the Public Schools Act, R.S.O. 1897, ch. 292, it is the duty of the school trustees to provide adequate school accommodation, and for such purpose to purchase or rent school sites or premises, and to build, repair, furnish, and keep in order the school houses, etc.

By sec. 31, sub-sec. 1, the trustees have power to select a site for a new school house or to agree upon a change of site for an existing school house, but they must forthwith call a special meeting of the ratepayers to consider the site so selected by them; and no site is to be adopted or change of site made . . . without the consent of the majority of such special meeting. By sub-sec. 2 it is provided that in case a majority

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of the ratepayers present at such meeting *differ* as to the suitability of the site selected by the trustees, *this difference* shall be determined by arbitration. From this language it is perfectly clear that the foundation of such an arbitration is a difference between the trustees, on the one hand, and a majority of the ratepayers at this special meeting, on the other, as to a school site *selected* by the trustees, whether such selection consists in choosing a site for a school house where there had been no school house before, or in choosing a new and different site for an existing school house. It is, I think, also reasonably clear that a site once chosen in the manner provided by the statute remains the school site of the section, and can only be changed or abandoned in the manner pointed out by the statute. Upon this site the trustees could repair, and, if necessary under sec. 62, rebuild, the school house, without calling a special meeting of the ratepayers, although under sec. 70 the ratepayers' consent is necessary if it is proposed to incur a debt for the purpose of building or rebuilding.

No change of site was proposed in the case before us by the trustees prior to the so-called arbitration proceedings. What they then proposed to do was to rebuild on the old site. No special meeting of ratepayers was convened or could have lawfully been convened to consider a school site chosen by the trustees, for they had chosen none. There was therefore a total absence of the necessary foundation for an arbitration between the ratepayers and the trustees, namely, a difference concerning a school site chosen by the trustees; and the whole proceedings were therefore void.

There could be no estoppel or waiver of the public right.

Sir John Robinson, C.J., in *Counties of Peterborough and Victoria v. Grand Trunk R.W. Co.* (1859), 18 U.C.R. 220, at p. 224, says that "the doctrine of estoppel can never interfere with the proper carrying out of the provisions of Acts of Parliament." As applied to public rights and public duties, this statement of the law could, if necessary, be fortified by numerous more modern decisions, which it is not necessary to cite.

Nor is it a matter of any consequence, in my opinion, that the award is on its face valid, as stated by the learned Chief

Justice of the King's Bench in refusing the order. I even doubt if the award is on its face a valid award. True, it states that it is an award under sec. 31 of the Public Schools Act, but it omits to set forth that which made it legally possible to have an arbitration under that section, namely, a difference between the trustees and the ratepayers at a public meeting called for the purpose concerning a site selected by the trustees. I am inclined to think that the award, instead of being good on its face, is at least of doubtful validity, for omitting to shew such a difference.

But the matter is not, I think, of the least consequence. Whether good or bad or doubtful on its face, it was an absolutely void proceeding unless such a difference existed, and its invalidity could have been set up by any one affected by it at any time. The facts were all easily within reach, and it was, I think, the clear duty of the township council, acting judicially and without bias on either side, to have investigated the facts, when they must have found, or been advised, that the award was a mere nullity, and in no sense an answer to the application of the trustees.

The appeal fails and should be dismissed with costs.

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[IN THE COURT OF APPEAL.]

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April 14.

REX V. KARN.

Criminal Law—Advertising Medicine Intended to Prevent Conception—Evidence to Support Conviction—Functions of Judge and Jury—Acquittal—New Trial—Crown Case Reserved—Appeal.

The defendant was tried upon an indictment for that he did unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise, and have for sale, a certain medicine, drug, or article, described, intended, or represented as a means of preventing conception, or causing abortion or miscarriage, contrary to the Criminal Code, sec. 179 (c).

The evidence for the Crown shewed that the defendant conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the defendant and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets; and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved. In the "directions" there was this statement: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets."

The Judge at the trial directed an acquittal, reserving a case for the Crown upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned:—

Held, that the jury could have legitimately inferred from the language used that the tablets were thereby represented as a means of preventing conception; and therefore it would have been right to have left the case to the jury; and a conviction might have been supported.

It is for the Judge to determine whether a document is capable of bearing the meaning assigned to it, and for the jury to say whether, under the circumstances, it has that meaning or not.

The Court declined to direct a new trial.

Per OSLER, J.A.:—Where there has been an acquittal, the trial Judge should leave the prosecutor to apply for leave to appeal, rather than reserve a case.

CROWN CASE RESERVED.

The defendant was indicted under sec. 179 (c) of the Criminal Code, which is as follows: "Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful excuse or justification, offers to sell, advertises, publishes an advertisement of or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion."

The defendant was acquitted, under the circumstances mentioned in the judgment.

A case was reserved, at the instance of the Crown, upon the question whether the evidence would support a conviction.

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 12th December, 1902.

J. R. Cartwright, K.C., for the Crown.

E. E. A. DuVernet, for the defendant.

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April 14. OSLER, J.A.:—The accused was indicted at the general sessions of the peace for the county of York, for that he did in the month of November, 1901, unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise and have for sale, a certain medicine, drug, or article, described, intended, or represented as a means of preventing conception, or causing abortion or miscarriage, and did thereby commit an indictable offence contrary to the Criminal Code, sec. 179 (c).

The trial took place on the 9th December, 1901, before the chairman of the general sessions of the peace and a jury.

The evidence for the Crown shewed that the accused conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the accused and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets, and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved.

On behalf of the Crown it was contended that the statement on the box and in both the circulars referred to, or some part of the same, or some expressions therein, shewed that the drug or article was thereby intended or represented as a means of preventing conception or causing abortion; and, therefore, that the accused, having offered to sell or having the article for sale

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or disposal, had committed an offence within the meaning of sec. 179 (c) of the Criminal Code, which enacts so, and it was urged that the case should be left to the jury to draw their own conclusions from the language of the printed notices, directions, and circulars proved.

The learned chairman of the sessions (McDougall, Co. J.) was of opinion, though with some doubt, that, looking at the whole advertisement, it was not one advertising a medicine for preventing conception or causing abortion, and he directed an acquittal, reserving a case for the Crown, if desired, upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned.

There was no evidence for the prosecution, except that which I have mentioned; and the question simply was, whether the advertisement was one of a medicine *intended* or *represented* as a means of preventing conception, etc. If that meaning could not be drawn from the circular, the notice, and printed directions, the case for the prosecution necessarily failed, as there was no extraneous evidence to give point to the language of the printed papers, and to shew that the medicine had been sold for the purpose said to be intended or represented. The section is new, and there is no corresponding section that I am aware of in any Imperial Act.

The defendant contends that the construction of the printed documents was wholly for the Judge. For the prosecution it is argued that it was wholly for the jury. I do not agree with either contention.

There is some analogy between a case of this kind and an indictment for sending a threatening letter, or for a libel. In Taylor on Evidence, 9th ed., sec. 43, it is said: "The respective duties of the Judge and jury on indictments for writing threatening letters are not very clearly defined. In some cases the jury have been permitted, upon examination of the paper, to decide for themselves whether or not it contained a menace. In other cases, the question appears to have been exclusively determined by the Court; while on a few occasions the opinion of the jury, and of the Judge, have been both alternately taken." Many authorities are cited. The result of the most recent and consistent is, that the jurisdiction of the Judge is

to determine whether the document is capable of bearing the meaning assigned to it, and it is then for the jury to say whether under the circumstances it has that meaning or not: *per* Lord Morris, C.J., in *Regina v. Coady* (1882), 15 Cox C.C. 89; *Regina v. Carruthers* (1844), 1 Cox C.C. 138.

It is not contrary to law to sell, or advertise for sale, the drug or medicine in question. The Act strikes at the abuse, not the use of it, which may be perfectly legitimate. From the nature of its action, however, it is a drug extremely susceptible of being used for an improper purpose, or at a period when it might produce a result which ought not to be sought for; and it cannot, therefore, be wrong to warn against its use for such purposes, or at such a period. In the absence of evidence that the warning on the outside of the box was intended to be read as an invitation to do the very thing warned against, in other words, that it was not an honest warning, I should have thought the learned chairman of the sessions was right in saying that the jury would not be justified in inferring from the warning alone that the drug was intended or represented as a means of preventing conception or causing abortion. There is, however, a paragraph in the "directions" which is of a more doubtful character, viz.: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets." I think the learned chairman should have held that this language, read of course with the rest of the printed matter, was capable of the obnoxious meaning, and that the jury could have legitimately inferred from it that the tablets were thereby represented, at least, as a means of preventing conception. Their object and operation in promoting and ensuring the regularity of the menstrual flow, which is, popularly at all events, supposed to be interrupted by conception, is so clearly and explicitly stated, that it might well be asked for what other purpose married ladies, or others who might desire to prevent pregnancy, would be likely to be using them monthly. I think, therefore, it would have been right to have left the case to the jury; and that, if they had taken an unfavourable view of the meaning of the paragraph referred to, a conviction might have been supported.

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This expression of opinion will probably be sufficient as a guide in future cases of a similar kind, as we are not obliged, nor do I think it would be right even if we have the power to do so, to direct a new trial, the defendant having been tried and actually acquitted; though, it may be, in consequence of an erroneous direction. The cases ought to be extremely rare in which the Court would think it right to place the accused a second time in jeopardy for the same offence, contrary to what has hitherto been one of the fundamental principles of English law. I express no opinion on this point at present: but it is not to be overlooked, that what the section of the Code speaks of in reference to a new trial on an appeal by the prosecutor, is where there has been a *mistrial* in consequence of an erroneous ruling of the Judge. I must say, speaking for myself, that where there has been an acquittal it would be more desirable for the trial Judge to leave the prosecutor to apply for leave to appeal, than to reserve a case. Very different considerations, of course, prevail where there has been a conviction after an erroneous ruling on some important point adverse to the accused.

MACLAREN, J.A.:—The accused was indicted at the general sessions for the county of York, under sec. 179 (c) of the Criminal Code, for offering to sell and advertising for sale a certain medicine called "Friar's French Female Regulator," intended or represented as a means of preventing conception or causing abortion or miscarriage. The label and advertisements were proved, and are made a part of the reserved case.

Some of the expressions relied upon by the Crown as bringing these advertisements within the statute are: "They will speedily restore the menstrual secretions when all other remedies fail." "Should this function become deranged from any cause whatever, relief can always be obtained by using the tablets." "The only certain and effectual emmenagogue known." "These tablets surpass all such compounds as pennyroyal, ergot, tansy, etc." "Thousands of married ladies are using these tablets monthly." "No name is ever divulged, and your private affairs, your health, are sacred to us." "Do not use the regulator during pregnancy."

The learned chairman of the sessions stated that he had some doubt whether the advertisement was an offence against the statute, and thought he ought to give the accused the benefit, and consequently withdrew the case from the jury.

If the language used could not properly bear the construction sought to be placed upon it by the Crown, then the case should have been withdrawn from the jury, there being no evidence to submit to them. But the learned chairman did not so hold, and did not place the withdrawal upon this ground. Some of the expressions objected to would appear to be clearly susceptible of such an interpretation, if indeed it might not be said that such was their ordinary and natural meaning, and I think it should have been left to the jury to say, whether, under all the circumstances of the case, taking into account not only the language itself, but also the context, the repetition of certain words and phrases, and the prominence given to them by special type or otherwise, the advertisement in question did or did not actually bear the meaning charged in the indictment. If they came to the conclusion that it did, they would then have to inquire further whether, in the language of the section above referred to, the public good was served by the act complained of, or whether there was any excess beyond what the public good required, or whether it was without lawful justification or excuse.

The respective functions of the Judge and the jury in a case like the present would appear to be very much like those in cases of threatening letters or obscene libels: see *Rex v. Girdwood* (1776), 1 Leach C.C. 142; *Rex v. Robinson* (1796), 2 Leach C.C. 749; *Rex v. Tyler* (1835), 1 Mood. C.C. 428; *Regina v. Carruthers*, 1 Cox C.C. 138; *Regina v. Smith* (1849), 1 Den. C.C. 510.

I am of opinion that the case should not have been withdrawn from the jury.

MOSS, C.J.O., MACLENNAN and GARROW, JJ.A., concurred.

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[BRITTON, J.]

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EMPIRE LOAN AND SAVINGS CO. v. McRAE.

May 4.

Damages—Liquidated Damages or Penalty—Sale of Land—Specific Performance—Extension of Time for Payment.

After judgment by vendors of land for specific performance, and before issue of the same, the parties entered into an agreement for an extension of three months for payment of the purchase money upon the purchaser paying down \$500, and providing that if the defendant should pay the balance of the purchase money within the time limited by the judgment, the plaintiff should give credit to him upon the said balance for \$500, but that if he should fail to do so, then the plaintiff should not be bound to give such credit, and in that respect time should be of the essence of the contract. A few days after the expiry of the time limited by the judgment the purchaser tendered the purchase money, less the \$500, which the vendor refused to accept:—

Held, that the above provision was of the nature of a forfeiture, and not of liquidated damages, and that the purchaser was entitled to be relieved from the terms of the judgment, and to have a conveyance of the property, after payment of the balance due less the \$500.

THIS was an action for specific performance brought by the vendor. Judgment was pronounced on November 13th, 1902, being the ordinary decree made for specific performance and for sale, thirty days being allowed for payment of the purchase money. After the pronouncing of the judgment, and before it was issued, negotiations took place between the parties, resulting in an agreement by which the vendors agreed to extend the time for payment of the purchase money for three months, and that the judgment should be issued embodying this extension, upon the terms of the purchaser paying down \$500. This agreement provided "that if the defendant should pay the balance of the said purchase money, interest, and costs within the time limited by the judgment, the plaintiff should give credit to the defendant upon the said balance for the said sum of \$500, but if the defendant should fail to make payment of the said balance within the time limited therefor by the said judgment, then the plaintiff should not be bound to give credit to the defendant upon the said balance for the said sum of \$500, and that in this respect time should be of the essence of this contract."

A few days after the expiry of the time limited by the judgment, the purchaser tendered the purchase money, less the

\$500. This the vendor refused to accept. Upon motion for final order for sale, the Master held that the purchaser was entitled to be relieved from the terms of the judgment, and to have a conveyance of the property upon paying the balance due after giving credit for the \$500.

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The appeal was argued before BRITTON, J., in Chambers, on April 27th, 1903.

C. D. Scott, for the appeal, contended that the Court had no power to relieve from the provisions of the contract; that the \$500 was not a penalty, but the price the vendor chose to exact, and which the purchaser agreed to give, for an extension of time for payment of the purchase money.

W. E. Middleton, for the defendant, contended that the provision of the contract was clearly a "penalty or forfeiture;" that it was not the price paid for the extension of time, as if the money was paid on the date fixed by the decree the plaintiff was bound to give credit; and that the purchaser coming promptly to the Court for relief upon his default, should be relieved upon the terms imposed by the Master: Ontario Judicature Act, sec. 57, sub-sec. 3; *Buckley v. Beigle* (1884), 8 O.R. 85; *Thompson v. Hudson* (1869), L.R. 4 H.L. 1, 15.

May 4. BRITTON, J.:—This is an appeal from the decision of the Master in allowing the defendant credit for \$500 paid on account by defendant, under the circumstances stated in the judgment.

The question for determination is whether this sum of \$500 is liquidated damages, or a penalty.

If liquidated damages, it is doubtful if the Court has power to relieve against it under sec. 57, sub-sec. 3 of the Judicature Act as it stands since the amendment by 60 Vict. ch. 15 (O.)

The learned Master thinks this a "forfeiture," and I agree with him.

Forfeiture is penalty for breach of duty, or breach of contract, and that is precisely in reality what this is, although in the agreement no such word as penalty or forfeiture is found. Nor is there anything in the agreement about liquidated damages.

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If not "liquidated damages," what is it if not a penalty? If there were damages even to a small amount, which by agreement the parties liquidated at \$500, I would not interfere; but here there are no damages. The plaintiffs are forcing property upon an unwilling purchaser; they have recovered judgment for amount of purchase money, and instead of enforcing judgment for the full amount on the day fixed for payment, accept \$500 on account and give three months, on condition that if balance not paid within the three months the \$500 are "not to be credited"—an euphemism for "are to be forfeited." The material words of this agreement, dated December 26th, 1902, are:—

[The learned Judge then set out the clause above quoted.]

This is an ingeniously drawn agreement; intentionally so drawn as to enable the plaintiffs to retain, without giving credit for it, the \$500, if the defendant should not be in time with balance, and so drawn as to avoid the use of the word "penalty" or "forfeiture," but to have default operate as a forfeiture of this sum. To give effect to this would be to regard the form, and ignore the substance. It might be very different if the defendant, upon paying the \$500, could at his option withdraw, or if the plaintiffs had in any way changed their position. The plaintiffs are entitled to no more than purchase money, interest, and costs, etc., and all this the plaintiffs are getting.

As a matter of fact, the \$500 were not paid on December 26th, but this sum, as appears by the clause, was paid by the defendant to the plaintiffs on January 5th, 1903, "on account of Sault Ste. Marie property." Time was apparently not regarded as of the essence as to this payment on account.

The plaintiffs are seeking relief. I think it would not be equitable to the defendant to compel the payment of the additional \$500, under the agreement in question, and also compel him to accept the land purchased.

Appeal dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

McINNES v. THE CORPORATION OF THE TOWNSHIP OF
EGREMONT.

D. C.

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April 17.

*Municipal corporation—Negligence—Non-repair of bridge—Absence of railing—
Sufficiency of notice—R.S.O. 1897, c. 223, s. 606, subs. 3.*

The plaintiff was crossing a bridge in the defendant's township during a thunderstorm at night on May 6th, 1902, when lightning caused his horse to swerve, and its foot went into a gap in the logs of the bridge close to the edge, and there being no railing they all fell over the side, and the plaintiff was injured. On May 26th he gave notice to the defendants of the accident as having occurred on May 7th, instead of on May 6th, but describing the circumstances, and also that he had sought the aid of a neighbour whom he named :

Held, that the cause of the accident was the negligence of the defendants in not providing a railing, and that the thunderstorm was one of those ordinary dangers which ought to have been thus provided against.

Held, also, that the notice given to the defendants was sufficient within sub-s. 3 of section 606 of the Municipal Act.

APPEAL by the defendants from the judgment of the Judge of the county court of the county of Grey, in favour of the plaintiff, in an action tried before him. The action was brought to recover damages alleged to have been sustained by the plaintiff owing to the negligence of the defendants in not keeping in proper repair, and in not protecting by a railing, a bridge upon a road under their jurisdiction, by reason whereof the plaintiff, with his horse and carriage, drove over the edge into the water below. The plaintiff's story was that he was driving along the road, between nine and ten o'clock at night, on May 7th, 1902, during a thunderstorm, and that as he was on the bridge in question, a sudden and vivid flash of lightning caused his horse to swerve: that the horse's foot went into a gap in the logs, of which the bridge was constructed, close to the edge of the bridge, and that there being no railing at the side of the bridge, they all fell over into the water, which was within eighteen inches of the bottom of the bridge. He got out of the water, and went to the house of one Peckover for assistance, and released the horse from the wreck, and drew out the carriage next day. The tracks of the wheels of his carriage were plainly visible, and curved from the centre of the bridge to the side, and to, or very near to, a gap in the logs, as described by the plaintiff.

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On May 26th the plaintiff gave a notice to the defendants that he had met with an accident on May 7th (instead of May 6th, which was the true date) at the bridge in question, which he described, stating that it was during the thunderstorm, and that a flash of lightning had caused his horse to swerve, and that "owing to the defective state of the bridge" he was thrown into the water: he further stated that he had rescued his horse with the aid of Mr. Andrew Peckover, and that the accident could not have happened had the bridge not been defective by being void of a proper railing. The learned Judge, after hearing the evidence, held the notice sufficient, and gave judgment for the plaintiff for \$200 and costs.

From this judgment the defendants appealed, and their appeal was argued before the Divisional Court (STREET and BRITTON, JJ.) on April 14th, 1903.

M. H. Kingston, K. C., for the defendants, contended that the notice required by sub-sec. 3 of sec. 606 of the Municipal Act, R. S. O. ch. 223, had not been duly given: *McQuillan v. Municipal Council of Town of St. Mary's* (1899), 31 O.R. 401; that the notice actually given misstated the date of the accident, and was too indefinite; and that it was the flash of lightning which really caused the accident.

A. G. Mackay, K. C., for the plaintiff, contended that the notice given was sufficient, and that the accident was due to the want of a railing to the bridge, and to its defective state.

April 17. STREET, J.:—In my opinion the learned Judge below was right in the judgment which he has pronounced.

The cause of the accident, as a matter of law and fact, was the negligence of the defendants in not providing the bridge with a railing to prevent accidents of this kind. It is true that this particular accident would probably not have happened had not the night been dark, and the lightning vivid at the moment the plaintiff's horse was on the bridge: but these are ordinary dangers to be provided for, and if the defendants had done their duty in protecting the sides of the bridge, the accident would have been avoided, and therefore they are liable.

I think, also, that the notice of action given by the plaintiff to the defendants is sufficient to comply with the requirements of sub-sec. 3 of sec. 606 of the Municipal Act, R.S.O. 1897, ch. 222, when the object of requiring that notice is taken into consideration.

A person who is injured and who claims damages is required to give notice of the accident and the cause thereof to the corporation within thirty days of its happening, as a condition precedent to the bringing of an action. In my opinion, the notice so given should state the time and place of the accident with reasonable particularity so as to identify the occasion, and so long as no mistake is made in either of these matters of a nature calculated to deceive or mislead the corporation to its prejudice, the notice will not be vitiated: see *Green v. Holt* (1882), 51 L. J. Q. B. 640; *Langford v. Kirkpatrick* (1878), 2 A.R. 513.

In the present case the place was clearly described, and the date was identified by the circumstances of a thunderstorm having taken place, and of the plaintiff having obtained the assistance of Mr. Peckover. Moreover, there is no suggestion whatever that the mistake in the date in any way misled the defendants.

With regard to the damages, it was argued that these had been assessed upon too liberal a scale: but the plaintiff was an elderly man, and was suddenly thrown out into cold water, and was obliged to remain for some hours in his wet clothes. He says he has suffered from the shock, and that he has suffered severely from rheumatism since. Under these circumstances, I do not think we can properly interfere with the view of the learned Judge as to the amount of the damages in the face of these facts and the reasons stated by him.

In my opinion the appeal should be dismissed with costs.

BRITTON, J.:—I agree with the conclusion arrived at by the learned county court Judge as to the liability of the defendant township.

This case brings up the oft repeated question of what constitutes negligence on the part of a municipality in the construction or maintenance of a highway or bridge. No

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general answer can be given. Liability must depend upon the particular facts and circumstances in each case.

There was evidence upon which the Judge could find, as he has found, that the bridge where the accident happened should have been supplied with a railing. And he has so found, although the bridge was well constructed, of good width, and not high above the bed of the small stream or watercourse which the bridge crosses. This is an important and much travelled highway. A well-settled township should protect those using this bridge by having a strong rail upon each side. Such a rail could be furnished at comparatively little expense, and it would add to the strength and durability of the bridge.

The want of the railing permitted the accident to the plaintiff, and it occurred without any negligence on the plaintiff's part.

Where there is liability, and where some damage unquestionably resulted, and where there is no evidence that the plaintiff is shamming, the finding of the trial Judge for the sum of \$200 should not be interfered with.

I agree with my learned brother Street as to sufficiency of the notice under sec. 606, sub-sec. 3, of the Municipal Act, R.S.O. 1897, ch. 223.

A. H. F. L.

[IN THE COURT OF APPEAL.]

IN RE THE CANADIAN PACIFIC RAILWAY COMPANY

AND

THE CORPORATION OF THE CITY OF TORONTO.

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Landlord and Tenant—Railway Company—City lease—Usual covenants—Covenants to pay taxes and repair—Right of re-entry—Rent in arrear—Interest on.

An agreement made between the City of Toronto and the Canadian Pacific Railway Company, provided, amongst other things, for a lease renewable in perpetuity, by successive terms of fifty years, ~~at~~ an agreed rent, payable on named days, nothing being said about covenants :—

Held, that the agreement was not self-contained, but that the execution of a formal lease was contemplated, which should contain the usual covenants, and that covenants to pay taxes, and for the right of re-entry for non-payment of rent or taxes, were, under the circumstances here, usual covenants. Where by the agreement, a time was fixed for the commencement of the lease, and the railway company entered into possession, and had the enjoyment of the demised premises, but the title was not settled until some time afterwards, interest on arrears of rent, which accrued due in the meantime, was allowed.

Judgment of Boyd, C., reversed in part.

THIS was an appeal and cross appeal from the judgment of Boyd, C., reported in 4 O.L.R. 134, where the facts, so far as material, are set out.

On December 4th, 5th, and 8th, 1902, before Moss, C.J.O., MACLENNAN, GARROW, and MACLAREN, JJ.A., the appeal and cross appeal were argued.

The arguments and authorities referred to were substantially the same as set out in the report of the case already referred to.

E. D. Armour, K.C., and *Angus McMurchy*, for the appellants.

C. Robinson, K.C., and *Fullerton*, K.C., for the respondents.

April 14. Moss, C.J.O.:—Reports of some of the proceedings in this much litigated matter appear in (1900) 27 A.R. 54; (1900) 30 S.C.R. 337; and (1902) 4 O.L.R. 134; but Mr. Cartwright, the official referee, has, in his opinion set forth its complete history, down to the time of making his report.

The appeal from his report was heard by the Chancellor, and from his judgment both parties appealed to this Court.

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The Canadian Pacific Railway Company complains of the learned Chancellor's holding in affirmance of the referee's report, that a covenant on the part of the lessees to pay taxes, and a power of re-entry by the lessors in default of payment of rent were properly inserted in the lease, and that rent should be payable from the 1st of January, 1895.

The city complains that the learned Chancellor erroneously decided that interest was not payable on the overdue gales of the rent reserved by the lease.

Dealing with these in their order, the chief and most important question is that raised by the objection that the lease should not contain a covenant to pay taxes. There are two instruments of agreement between the parties, the first dated the 26th of July, 1892, and the other dated the 4th of February, 1895, and it is under them that the questions arise.

In brief, their effect is stated by my brother Maclellan in 27 A.R. at p. 59, as follows: "There is a contract for a lease, renewable in perpetuity, in successive terms of fifty years, at an agreed rent, payable on named days; and the agreement is silent as to what, if any, covenants on the part of either lessors or lessees are to be inserted therein." It was argued for the Canadian Pacific Railway Company that the agreement was self-contained, and that there was no occasion or necessity for a further instrument or lease, in order to give effect to the contract between the parties.

It seems manifest, however, not only from the terms of the agreement itself, but from the conduct of the parties, that a formal instrument of lease was contemplated. In paragraph 19 of the first agreement, provision is made for apportionment of the first quarter's rent "having regard to the time of possession under said lease"; and in paragraph 20 "the execution of such lease" is spoken of. In paragraph 3 of the second agreement, it is provided that the alternative site is to include "and in the lease thereof shall be described, etc." The proceedings now under review were taken under an order of the High Court, obtained at the instance of the Canadian Pacific Railway Company, whereby it was referred to the referee to determine amongst other things, all matters as to the time of delivery of the abstract, the sufficiency thereof, and all

subsequent questions arising out of, or connected with, the title to the said site, and the carrying out of the said agreements respecting the making of title to, and the conveying of the said alternative site. And in proceeding under this order of reference, both parties brought in and submitted to the referee draft leases of the premises.

One can hardly suppose that in dealing with such a large and valuable tract of land in the city of Toronto, and proposing to lease it practically for all time in successive terms of fifty years each at an increasing rental, the parties intended that all questions respecting their rights and obligations, should rest solely upon the bald provisions of the agreement. There is nothing in the agreement from which it can fairly be inferred that the parties when they negotiated the lease did not contemplate anything, or agree to anything that was not written in the agreement. It was eminently proper that a more formal instrument setting forth particularly and precisely the terms of the letting and holding, and the rights and obligations of the parties in respect thereof, should be prepared and executed. And in many respects the parties are now at one as to what the instrument should contain; and, except in respect of the matters now in question in this appeal, they have accepted the lease settled by the referee as a proper instrument.

There was much discussion whether, in settling the terms of the lease, and especially in regard to the covenant as to payment of taxes, the referee should have received, or acted upon the parol evidence adduced. The referee was obliged to determine what the lease should contain, and the agreement being silent except as to the term and the amount of rent to be paid, it was necessary for him to ascertain in some way what other provisions, terms, and conditions should be inserted in it.

In Woodfall's Landlord and Tenant, 17th ed., p. 135, it is said that the question what are usual covenants, appears to be one of fact in a case where the parties stipulate for usual covenants; but to be a question of law, where the contract for the lease is silent as to covenants. But it would appear that whether the contract is silent or not as to covenants, there are certain covenants which, *primâ facie*, go

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into the lease as usual covenants. Even these, however, may be subject to variation, having regard to special circumstances.

In *Hampshire v. Wickens* (1878), 7 Ch. D. 555, Sir Geo. Jessel, M.R., refers with approval to the statement in Davidson's *Precedents in Conveyancing*, that "The result of the authorities appears to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing 'usual covenants,' or, which is the same thing, in an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon." The learned author then specifies certain covenants, and amongst those by the lessee is included one to pay rent, and to pay taxes except such as are expressly payable by the landlord.

It is insisted that in this Province taxes are, by virtue of sec. 26 of the Assessment Act, payable by the landlord in the absence of agreement to the contrary; and that the agreement here being silent, the covenant to pay taxes is improper. But the covenants which are usual and proper depend very much on the nature of the property. Here the parties do not occupy the position of ordinary landlord and tenant. The city is not an owner within sec. 26, from whom taxes could also be recovered. The lands leased being the lands of a municipality, do not come within the general rule of liability to taxation against the owner to which sec. 26 makes reference. They are governed by the exemption clause, sub-sec. (7) of sec. 7. Therefore, while occupied for the purposes of the city, or unoccupied they are not liable for taxes under the Assessment Act; nor can taxes be recovered from the city in respect thereof. But, upon their becoming occupied by a tenant or lessee, they cease to be exempt. Then they become property liable to the taxes imposed by the city, and to be paid to the city as part of the income which it is entitled to provide by taxation of property within its limits. The reason why the law declares that in the case of lands—the property of a municipality—the owners are not liable for taxes upon them while occupied or used by such owners, but that when used or occupied by a

tenant or lessee they fall back into the category of property liable to taxation, is very apparent. It would be useless for the municipality to tax itself for revenue purposes. But when the lands become occupied by a tenant or lessee, the municipality becomes entitled to treat it as his property for revenue purposes, and to tax it in his hands. For the purposes of taxation, it is his property, and if it is not to be classed as land, real property, or real estate, under sec. 1 (9) of the Assessment Act, why may it not be classed as personal estate, or personal property, under sec. 1 (10)? That sub-section is made to include "all other property except land and real estate and real property" as defined in sec. 1 (9). The definition in sec. 1 (9) does not include leasehold interests, and so they fall within the term "all other property" in sec. 1 (10). Applying, then, the rule approved of by Jessel, M.R., the agreement carries in itself the *primâ facie* right to the covenant in the form settled by the referee.

The parties must be taken to have dealt with knowledge of the position of the property in this respect, and in the absence of anything to the contrary, must be deemed to have contracted with reference to that condition of affairs. Unless displaced by evidence, the presumption would be that the Canadian Pacific Railway Company understood, as any person dealing with the city for a lease of lands would understand, that to become a tenant or lessee of the city, involved liability to pay city taxes in respect of the leasehold premises. As the learned Chancellor points out, the incidence of such taxation plainly falls upon the tenant or lessee, and not upon the city. And, in order to bring about this result, and to entitle the city to a covenant by the tenant or lessee to that effect, it is not necessary that it should have been expressly so agreed. Unless by the terms of the agreement or the special circumstances of the case it is made to appear that the tenant or lessee was not to pay taxes, the liability of the tenant or lessee arises from the assumption of that relation in respect of lands, the property of the city. Whether the question is to be determined as one of law or as depending upon evidence, there is no difficulty in reaching the conclusion that a covenant to pay taxes is a usual covenant in a lease of land forming part of the municipal

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property. Therefore, in settling the lease in question, the city is entitled to have a covenant to that effect inserted, unless it is made to appear, that by reason of the circumstances or of the terms of the agreement, the Canadian Pacific Railway Company is relieved from the ordinary obligation of a tenant or lessee of city property to pay the taxes imposed upon it.

From the nature of this case, it is obvious that cases where taxes are chargeable against, and recoverable from, the owner, furnish no analogy. The question of whether the covenant to pay taxes is a usual one for insertion in a lease of the kind in question here, must be determined by other considerations. It is shewn that by the invariable practice of the city, all leases of its lands for long or renewal terms, contain a covenant on the part of the lessees to pay taxes. The greater portion of the lands forming what is termed the original site, were lands belonging to the city, held under leases for long or renewable terms. The Canadian Pacific Railway Company had acquired, or was endeavouring to acquire, the lessee's interests, when the agreement was made by which the alternative site was substituted. These leases were produced, and they shew that under them the lessees paid rent and taxes. The Canadian Pacific Railway Company, in acquiring the terms, became liable to the same extent. It cannot be assumed that in the exchange effected, whereby other city lands were substituted, the latter were to be freed in the lessee's hands from a burden which the former were subject to in their hands. There is nothing in the evidence to lead to the conclusion that any such agreement was come to. The conversation between Mr. Biggar and Mr. Clark seems to have been merely a discussion between themselves apart from the other counsel and parties present at the time. It was not then communicated to them, and resulted in nothing.

I think, therefore, that a covenant to pay taxes was properly inserted in the lease, and that it should stand as indicated in the judgment of the learned Chancellor.

The proviso for re-entry on non-payment of rent is so common and usual in leases that it ought not to be excluded in this instance upon the mere suggestion that difficulty may arise in enforcing it. At present I am not convinced that sec. 143 of the Railway

Act applies to the circumstances of this case; and it is not unimportant to note, that up to a late stage of the proceedings, counsel for the Canadian Pacific Railway Company entertained the view that the covenant for re-entry was proper so far as non-payment of rent is concerned.

Upon the argument, much was made of the fact that the agreement had been confirmed by statutes. But the rules of construction were not thereby affected. No doubt, after the legislation the Court would not interfere to set aside or reetify the instruments on grounds of fraud, surprise or mistake, but they remain to be construed according to their language, and the rules applicable thereto, as if there was no legislation.

As to the date from which rent should be payable, I see no reason for disturbing the conclusion arrived at by the learned Chancellor. In 1893 the Canadian Pacific Railway Company went into possession, and from a period anterior to January, 1895, it has been continuously in possession of the alternative site, with tracks and freight sheds, and has been using it for all purposes without let or hindrance from the city. And it has not been shewn for the Canadian Pacific Railway Company that the occupation was not as beneficial as that for which it was to pay rent. The original agreement provided for apportionment of the first quarter's rent, having regard to the time of possession under the lease, and properly so, for at the date of that instrument the Canadian Pacific Railway Company was not in possession. But at the date of the second instrument (4th February, 1895) the Canadian Pacific Railway Company was in possession and the agreement fixed the date of the commencement of the first term as of January, 1895. Thus all uncertainty as to the time from which rent should be payable was removed.

I think, therefore, that the appeal of the Canadian Pacific Railway Company fails, and that it should be dismissed.

But I am unable to agree with the learned Chancellor that interest was not payable in respect of the arrears of rent. The gales of rent were payable by virtue of a written instrument, at a certain time, and so fall within secs. 113 and 114 of the Judicature Act. The reasons urged against the application of these provisions, *i.e.*, delay in perfecting the title and comple-

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tion of the transaction, however forcible in the absence of possession and beneficial enjoyment by the Canadian Pacific Railway Company, ought not to prevail in face of that fact.

In *Marsh v. Jones* (1889), 40 Ch. D. 563, the Court of Appeal held the plaintiff entitled by way of damages to interest on purchase money from the day on which the purchaser had taken possession, although the amount of purchase money was not finally ascertained for more than two years after possession taken.

I am of opinion that the referee's finding in respect of interest should not have been disturbed.

The result is that the appeal of the Canadian Pacific Railway Company is dismissed, and the appeal of the city of Toronto is allowed. Costs will follow the event.

MACLENNAN, J.A.:—Notwithstanding the very elaborate arguments which were addressed to us by counsel for the appellants, the Canadian Pacific Railway Company, I think the questions involved are comparatively simple, and free from difficulty.

The nature of the case is explained in the report of the former appeal, 27 A.R. 54, and need not be restated here. After that judgment the case went back to the referee, and he reported on the 4th March, 1902, having settled a lease containing covenants on the part of the lessees to pay rent and taxes, and to repair, and to allow the lessors to enter and view the state of repair, with a proviso for re-entry on non-payment of rent. He also determined that rent should be payable from the 1st of January, 1895, with interest from that date; and he computed the amount of the arrears of rent, and of the interest which had accrued thereon.

On appeal by the Canadian Pacific Railway Company from this report, the learned Chancellor affirmed the same with certain variations. He disallowed the interest on arrears of rent, and struck out the covenants to repair, and to allow the lessors to enter and view state of repair, and to repair according to notice; and he inserted in the covenant to pay local improvement taxes, an exception in respect to all works required by the agreement to be performed and provided by

the lessor. There were other variations not material to be stated.

The Canadian Pacific Railway Company now appeals from that judgment in respect of the covenant to pay taxes, and re-entry for non-payment: and also as to the time for the commencement of rent. The city cross appeals on the question of interest, and these are the only questions to be considered.

On the question of the covenant for the payment of taxes and the power of re-entry for non-payment, I think the judgment must be affirmed. Comment was made upon a remark of the learned Chancellor, that the lease being for a perpetual renewal by successive terms of fifty years, the lessee may be regarded as the owner for all practical purposes, and within the meaning of the Assessment Act. But his judgment in no degree rests on that proposition. No doubt, although the term is renewable in perpetuity, the lessee is not the owner in fee, but a tenant paying rent. The lessor is still the owner in fee, and can sell and convey the reversion, and the case must be decided with reference to that state of facts.

Subject to that remark I agree with the reasons for his judgment on the question of the covenants, nor do I think it necessary to repeat them in language of my own which would probably be less clear and forcible than his.

I have also perused the very able and satisfactory discussion of the case by the learned referee, and so far as relates to the question now in appeal I agree with his conclusions, and with the reasons which he gives for them.

He has made it very clear that evidence of previous negotiations, relied on by the appellants, is not admissible to qualify the agreement, or to affect its construction, and I would add to his citation of authority the case of *Ingles v. Buttery* (1878), 3 App. Cas. 552. He has also shewn that the municipal tax which is in question here is very different from the English land tax, which is held not to be a tax which it is usual for a tenant in England to covenant to pay.

What has to be determined then is whether, upon the contract entered into by the parties, the lease which has been contracted for is to be wholly silent on the subject of taxes, and

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if not, which of the parties ought to covenant for their payment?

The contract is for a lease of an extensive piece of vacant ground, and land covered with water, to a great railway company for its station grounds, tracks and appurtenances in the city of Toronto for a term of fifty years, renewable perpetually, at a fixed annual rent for the first term, with a fixed increase upon every renewal.

Such a lease is what is sometimes called a building lease, or a ground lease, and the rent is called a ground rent; the intention and purpose of the parties being, that the tenant may erect such buildings and make such improvements upon the land as he thinks fit, at his own expense.

The municipal tax in question is an annual tax, imposed and levied in each year, to defray the municipal expenses and charges of the year. Each parcel of land, and all the buildings and improvements thereon, are valued each year at their actual value, and a rate or tax is imposed in proportion to that value. Both the owner and the tenant or occupant are assessed and liable to pay (subject to certain exceptions). The tax is also a charge on the land, and may be recovered by distress. A municipality does not assess its own land when in its own occupation, for that would be absurd; but when in possession of a tenant municipal land is assessed at the same value as if it belonged to another. When both landlord and tenant are assessed and liable to pay, the question which of them ought to bear the tax depends on agreement, and in the absence of agreement, the tenant, if compelled to pay, may deduct it from his rent.

It follows from this that the tax being in proportion to value, including buildings and improvements, if a tenant has the right to erect buildings and to make improvements, he has the power to increase the yearly tax, and so to diminish the rent to be received by the landlord, if the latter has to pay the tax. Obviously the improvements might greatly exceed the value of the ground, so that the tax might exceed the rent received, to the ruin of the landlord, if the tax had to be borne by him.

To illustrate this point: Suppose ground worth \$200,000 leased with perpetual right of renewal at a rent of \$12,000 per

annum for the purpose of building a great hotel. The hotel is built at a cost of a million and a half dollars. When finished the whole is assessed at \$1,700,000. The tax at 19 mills on the dollar comes to \$32,000 per annum, or more than double the ground rent. If in this case the landlord had to pay the tax his ruin would be complete.

In the present case the land being leased expressly for the company's station grounds, tracks and appurtenances the company might at once fill up the land covered with water, or erect expensive wharfs and warehouses thereon, and upon the dry ground might erect expensive buildings and works for their station and other requirements, or even an hotel as we know they have done in many places, whereby the land with buildings and improvements might become many times as valuable as at the commencement of the term, in which case if the lessor were a private owner his ground rent would be more than exhausted by the payment of taxes, unless he had a covenant from the tenant to pay them.

It follows that no sane private owner would make such a lease without requiring a covenant from the lessee to pay taxes. And accordingly the evidence before the referee is uniform that invariably in the case of long leases at a ground rent for building purposes the lessee covenants for the payment of taxes. Twenty-five out of twenty-six experienced conveyancers, being solicitors, called as witnesses before him testify that of the numerous leases of that kind observed by them in long years of practice, they had never seen any in which the lessee had not covenanted to pay the taxes.

In the judgment of this Court on the former appeal, it was shewn that in a contract for a lease, which was silent as to the covenants, the parties were entitled to have inserted such covenants as were usual and proper; and the decision was that it might be shewn by evidence what covenants were usual and proper in any case.

I think it appears from the very nature of this case that the covenant in question is a proper one, and it is abundantly shewn by the evidence above referred to that it is not only proper but usual. In *Bennett v. Womack* (1828), 7 B. & C. 627, referred to in the former appeal, and a case which I do

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not find was ever questioned, the Court of King's Bench held that in the case of a public house lease, a proviso for re-entry, if any business other than that of a victualler should be carried on in the house, was a usual covenant, the evidence being that six in ten of such leases contained it. The evidence in this case is much stronger, as I have pointed out, being uniform that building leases such as the present invariably contain the covenant in question on the part of the lessee.

Now I think this contract between the city of Toronto and the Canadian Pacific Railway Company must be carried into effect exactly as it would and ought to be if it had been made, not between the city and the company but between a private owner and the company. It makes no difference that if it had been the case of a private owner he would be assessed as well as the tenant, and liable to pay the tax, while the city cannot tax itself and is not liable to pay.

I have said that no sane private owner would make such a lease without requiring a covenant by the lessee to pay taxes. Not only is that so, but if a trustee were to do so it would be a most improvident act, and a clear breach of trust; and the corporation of Toronto is a trustee for the inhabitants. So, also, if the Court were authorizing such a lease by an infant, or under the settled estate clauses of the Judicature Act, such a covenant would certainly be required of the lessee.

It seems to me also that the appellants are in this dilemma. If their contention be well founded, the lease must be altogether silent as to taxes; for they have not at any time contended, and indeed could not contend, for the insertion of a covenant that the lessors should pay them. In that case the appellants would be liable to assessment under section 7 of the Act, and the lessors would be exempt under sub-section 7 of the same section, and the lessees would have no recourse against the lessors under section 26, inasmuch as that section only applies when the tax "could also have been recovered from the owner."

The appellants further contended that the judgment should not have charged them with rent from the day named in the contract for the commencement of the term.

I am clearly of opinion that in that respect the judgment is right. The first agreement was executed on the 26th July,

1892, but no day was therein mentioned for the commencement of the term. On the 4th February, 1895, a further agreement was made which declared that the term should begin on a day then first named, on the 1st day of January, 1895. The appellants had been in actual possession of the premises long before that second agreement, but the title had not yet been investigated or completed, and the new agreement makes provision for that investigation. That being so, it is plain that the liability to pay rent from the commencement of the term, cannot be cut down by the subsequent investigation of the title, or the delays which attended it. By the terms of the two contracts, taking them together, it is the covenant of the appellants to pay rent from the commencement of the term, that is from the 1st day of January, 1895, and the equity of the case is with the respondents, instead of the appellants, inasmuch as the appellants were in possession before that day, and were never afterwards disturbed.

This ground of appeal also must be dismissed.

On the cross appeal I am of opinion that it ought to succeed.

By virtue of the two agreements the rent was agreed to be paid in certain sums and at certain times, and the case is within sec. 114 (1) of the Judicature Act, and the interest was, I think, properly allowed by the referee.

The appeal of the Canadian Pacific Railway Company should therefore be dismissed, and that of the city of Toronto should be allowed, both with costs.

The costs of the appeal before the Chancellor may remain as directed by him, the variations obtained there by the company being of considerable importance.

GARROW, J.A.:—I have had the advantage of perusing the judgments of the Chief Justice and Mr. Justice Maclellan, and while concurring in the conclusions reached by them, I desire to state as briefly as I can the point of view from which I have reached the same result, at least as to the main question, the liability on the part of the plaintiffs to pay municipal taxes on the lands in question.

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The contracting parties are not, it is to be observed, in the situation of private individuals, at liberty to enter into such lawful agreements as they may please about their private property. Both are corporations, the plaintiffs as an inter-provincial railway under the exclusive legislative jurisdiction of the Dominion Parliament; and the defendants a municipal corporation under the like exclusive legislative jurisdiction of the legislative assembly of the Province of Ontario.

The agreement of July 26th, 1882, in section 18 recites that the plaintiffs had heretofore taken steps towards obtaining a site in Toronto for its station grounds, tracks and appurtenances, and that the defendants had proposed to the plaintiffs to abandon the said proposed site and to take instead "for the said purposes" another, further west, called the "alternative site" (the lands now in question) to which the plaintiffs had agreed. The lands, therefore, now in question are lands required, and intended to be used, by the plaintiffs for the purposes of their railway, for its "station grounds, tracks and appurtenances," or, in other words, for the ordinary purposes of the railway. And these lands, the defendants in that agreement covenant and agree to "demise and lease" to the plaintiffs for successive terms of 50 years each, during all time to come, at a rental for the first term of 50 years, of \$11,000 per annum; and the rental for each succeeding term of 50 years to be increased at each renewal by the sum of \$2,750 per annum.

By section 21 of the agreement before referred to, it is declared that "except as herein otherwise provided, the provisions of the Railway Act, and of the Municipal Act, so far as applicable to anything herein contained, shall form part of this agreement as if expressly set out herein." This provision was, perhaps, unnecessary, because without it the provisions of these statutes would certainly, "as far as applicable," have entered into and formed part of the agreement. But, at all events, the section before quoted makes it clear that the parties intended to contract expressly under, and subject to, the provisions of these statutes "except as herein otherwise provided." No express reference is made in the agreement to the Assessment Act (R.S.O. 1887, ch. 193) then in force, but

it is clear that the provisions of that statute could not be ignored, and are as much applicable as are the other statutes which are referred to.

The effect of the agreement was, that the defendants were parting with these lands, practically for all time to come, at an annual rent; and the plaintiffs were acquiring them for the ordinary purposes of their railway, and as an integral part of it, subject only to such annual rent.

There is nothing in the Railway Act, so far as I can see, which in terms compels a railway company to obtain and to hold its land in fee simple; although from the nature of the case a holding under a title equivalent to the fee seems to be implied: see sections 90 and 136 to 172. An exception more apparent than real seems to be made by section 142 in the case of persons who cannot in common course of law sell or alienate—in which case it is declared that a fixed annual rent shall be agreed upon as an equivalent for the principal sum to be fixed for the lands in such a case; and by section 143 a special lien in respect of such annual rent is given. Even under these sections it is apparently implied that the railway company shall in effect become the owner of the lands, subject to the rent charge agreed upon, or settled by arbitration. Then under section 93, the company has special borrowing powers, and may pledge its assets in security, subject to certain fixed prior charges, and the bonds, debentures or other securities shall be taken and considered to be the first preferential claim and charge upon the company, and the franchise undertaking, tolls and income, rent and revenues, and real and personal property thereof, save and except as to such prior charges before referred to.

In view of these sections, and indeed of the whole scope of the Act, it appears to me that it is contrary to the spirit, if not to the letter of the statute, that any part of the land to be held and used by the railway and forming an integral part of it, should be held as a mere chattel interest under an ordinary lease, and, as such, subject to the usual incidents of distress, right of re-entry for non-payment of rent, ejectment or other remedies provided by and under the control of the provincial legislature, as in the case of landlord and tenant.

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The agreement in question has been confirmed by the Dominion Parliament, one effect of this confirmation is, in my opinion, to enable these lands to be held as ordinary railway lands; just, for instance, as lands acquired under section 142 would be held, and I therefore think that in view of all the circumstances, and notwithstanding the use in the agreement of the words "demise and lease" the proper conclusion is that the transaction in question really is equivalent to a sale of the lands by the defendants to the plaintiffs in consideration of the annual rent before mentioned: *Wells v. Savannah* (1901), 181 U.S.R. 531, and that while it may be permissible to give effect to the transaction by retaining the form of an indenture of lease and the use of the words "demise and lease," perhaps a more correct form would be that of the ordinary grant, or bargain and sale, reserving the rent as in the nature of a rent charge, and providing for the renewals, etc.

The result of such a construction is, of course, to dispose of the plaintiffs' main contention adversely to them, because if the lands in question are to be held as ordinary railway lands, they would, in the absence of an express statutory exemption, be properly assessable for local taxes like other railway lands, under section 29 of R.S.O. 1887, ch. 193, and all questions of what are and what are not proper covenants as between landlord and tenant would be eliminated. It is not claimed, and could not be, by the plaintiffs, that there is in the agreement any express exemption of the lands in question from taxation. The utmost claimed is that as a matter of construction they are entitled to the exemption.

This contention, however, pre-supposes that the contractual relationship created by the agreement, between the parties, is the usual one of landlord and tenant. The case, from that standpoint, is fully dealt with in the judgment of my brother Maclellan, and I do not desire to repeat what he has said. But, as bearing upon the point of view which I have been presenting, I desire to glance at the statutory situation of the defendants at the time the agreement in question was made—a situation which, I think, directly bears upon the matters mainly in question: whether the case is regarded as one of vendor and purchaser, or of landlord and tenant. As

before pointed out, the provisions of the Railway Act and of the Municipal Act are explicitly, and of the Assessment Act impliedly, incorporated into the agreement. I have before pointed out briefly the relevant provisions of the Railway Act, and I will now do the same with the Municipal and Assessment Acts. It is first to be noted that when the Provincial statute, 55 Vict. ch. 90, 1892, was passed, the agreement in question stood as a mere proposal. It was not executed until some months afterwards; and the last mentioned statute merely authorized the parties to make it, and the Dominion statute, 56 Vict. ch. 48, confirmed it after it had been made. The Assessment Act then in force was R.S.O. 1887, ch. 193. By section 7, sub-sec. 7, it is declared under the heading of "Exemptions," that "all property in this Province shall be liable to taxation, subject to the following exemptions, that is to say . . . sub-sec. 7—the property belonging to any county or local municipality, whether occupied for the purposes thereof or unoccupied, but not when occupied by any person as tenant or lessee, or otherwise than as a servant or officer of the corporation for the purposes thereof."

By section 366 of the Municipal Act, R.S.O. 1887, ch. 184, it is provided that "Every municipal council shall by a two-thirds vote of the members thereof have the power of exempting any manufacturing establishment or any water works or water company in whole or in part, from taxation, for any period not longer than ten years, and to renew this exemption for a further period not exceeding ten years."

This power, it is not unimportant to observe, has not been enlarged in subsequent legislation, but, on the contrary, has been practically taken out of the hands of the municipal councils, and now can only be exercised by a vote of the ratepayers. See R.S.O. 1897, ch. 223, sec. 411, which first took from the power of the council in this respect, school taxes. See also 63 Vict. ch. 33, secs. 8, 9, 10 and 11 (O.); and 2 Edw. VII., ch. 29, sec. 39 (O.).

In these circumstances, it appears to me that nothing short of an explicit enactment by the legislature would have authorized an agreement to exempt these lands for all time to come, whether the plaintiffs are to be regarded as purchasers or as tenants. The Assessment Act declares in the most positive

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terms that municipal land on becoming occupied shall be taxable. No municipal council could, by agreement or otherwise, over-ride that provision and say they shall not be taxable. The only powers of exemption which such councils had were those before pointed out, powers always strictly limited in point of subject matter and duration, and which have been since practically withdrawn, so that in my opinion no fair or reasonable construction of the agreements in question, or of the statute confirming or authorizing them, could give or ought to be held to have given, to the plaintiffs relief from this common burden of local taxation.

For these reasons I think that the covenants in question are proper covenants, the parties having elected to effectuate the transaction in the form in which it comes before us.

With reference to the question of interest, I agree with the conclusions of the Chief Justice.

MACLAREN, J.A., concurred.

G. F. H.

[IN THE COURT OF APPEAL.]

BALFOUR V. TORONTO RAILWAY COMPANY.

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June 20.

Street Railways—Negligence—Car Running Backwards—Jury—Answers to Questions.

The plaintiff was injured by a waggon in which he was being driven, being struck by an electric car of the defendants, which was running backwards in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the Judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed :—

Held, that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded and was not merely a specific finding in answer to a question.

Per ARMOUR, C.J.O. : Questions to the jury must be in writing.

Per OSLER, J.A. : While it is more convenient that questions to the jury should be in writing, the Judge is not bound to adopt that course.

Judgment of Falconbridge, J., affirmed.

AN appeal by the defendants from the judgment at the trial was argued before ARMOUR, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, J. J. A., on the 11th of October, 1900. The facts are stated in the judgments.

James Bicknell, for the appellants.

John McGregor, and *H. M. East*, for the respondent.

June 20. ARMOUR, C. J. O. :—The plaintiff having occasion to go to the exhibition buildings in Toronto for some materials, procured one Crashley to drive him in an express waggon, which he started to do, proceeding up Queen street to Dufferin street, and thence down Dufferin street across King street towards the exhibition buildings at the southerly end of Dufferin street.

Upon Dufferin street to the exhibition buildings are tracks of the defendant company, the westerly one being for their cars going south from King street, and the easterly one being for their cars going northerly to King street.

Crashley was driving from King street towards the exhibition buildings, upon the westerly track, and hearing a car

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coming after him, and supposing that it was coming down the westerly track, turned his horse on to the easterly track, and just as he did so he heard the gong sound, and turning round saw the car coming down the easterly track, and immediately turned his horse back on to the westerly track, but before he could get out of the way, his waggon was struck by the car, which was running reversely, and the plaintiff was thrown out and very severely injured.

The evidence was contradictory as to the distance the car was from the waggon when Crashley turned on to the easterly track and was seen by the conductor of the car, as to the rate of speed at which it was proceeding at that time, and as to the distance it went after striking the waggon.

The contention on the part of the plaintiff was that the car was going at too great a speed, having regard to the way in which it was being run; that the motorman being at the rear of the car, was not in a position to see the danger and to stop the car as readily as he ought to have done, and that there was want of proper care on the part of the defendants under the circumstances.

The learned trial Judge, Mr. Justice Falconbridge, after fully directing the jury upon the law and facts applicable to the questions raised at the trial, said: "I shall direct the clerk of the Court—for another Judge will be here—to ask you, in the event of your returning a verdict for the plaintiff, what negligence you point to."

This was not said at the request of either counsel, nor was it objected to by either of them.

He then directed the jury on the question of damages, and the jury retired.

When the jury returned the Chancellor was presiding, and the following took place:—

"The clerk of the Court—Are you agreed on your verdict? The foreman—We find that the street railway company were responsible for the accident, for the following two reasons: that the car was on the wrong track according to the general custom; second, that the motorman and his appliances were in the rear of the car instead of the front, the car being reversed; and we assess the damages at three thousand dollars.

His Lordship—You say, gentlemen, the car was on the wrong track according to the general custom? The foreman—Yes, my Lord. His Lordship—And, second, the motorman had his appliances at the rear of the car? The foreman—Instead of the front, the car being reversed. It was running backward, my Lord.

His Lordship—I have just noted these special observations you make about the negligence. *Mr. Bicknell*—I do not think your Lordship should enter it in that way. I submit that your Lordship should enter the two special findings, leaving it open for a motion.

His Lordship—You give your verdict for \$3,000, gentlemen? The foreman—Yes, my Lord. *Mr. Bicknell* objects. His Lordship—I will leave it with Mr. Justice Falconbridge to deal with."

Subsequently Mr. Justice Falconbridge directed judgment to be entered for the plaintiff for \$3,000, with full costs of suit.

The verdict found by the jury in this case was, in my opinion, a general verdict for the plaintiff, and the reasons given by them form no part of their verdict, and are not to be treated as affecting it in any way.

In *Bushell's Case* (1682), Vaughan 135, it is said: "The legal verdict of the jury to be recorded is finding for the plaintiff or the defendant. What they answer, if asked, to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives therefor, as well as Judges in giving judgment for the plaintiff or defendant may differ in the reasons wherefore they give that judgment, which is very ordinary:" *Tonkin v. Croker* (1704), 2 Ld. Raymond 860; *Taylor v. Willes* (1630), Cro. Car. 219; Viner's Abridgt. "Trial," vol. 21, p. 395; *Sheridan v. Pidgeon* (1886), 10 O.R. 632.

The jury were not asked to find of what particular negligence the defendants were guilty, but merely what negligence they (the jury) pointed to.

But the Judge having in effect directed the jury to find a general verdict, he was not, in my opinion, entitled to ask them

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any question tending to shew how they arrived at it, their reasons for it, or the grounds of it.

Where a general verdict is found by the jury, they ought not to give their reasons for it: *Horner v. Watson* (1834), 6 C. & P. 680.

And after they have given their verdict, they cannot be interrogated by the Judge as to their reasons for it: *Brown v. Bristol and Exeter R. W. Co.* (1861), 4 L.T.N.S. 830.

Until the passage in this Province of the Act, 37 Vict. ch. 7, sec. 32, a jury were not bound to answer questions submitted to them by the Judge, and might decline finding any other than a general verdict or a special verdict, if so directed: *Mayor, etc., of Devizes v. Clark* (1835), 3 A. & E. 506.

And if it became necessary in any case to ask the jury any question, it could only be done with the consent of the parties and of the jury: *Walton v. Potter* (1841), 3 M. & G. 411.

As the law stands now, I do not think that when the Judge directs the jury to find a general verdict, they can be asked to answer any question tending to shew how they arrived at their verdict, or their reasons for it, or the grounds of it.

The Judge can, however, in a case like the présent, instead of directing the jury to give either a general or a special verdict, direct the jury to answer any questions of fact stated to them by the Judge for the purpose, and in such case the jury shall answer such questions and shall not give any verdict; and on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered.

This provision obviates any difficulty arising from the consequences above mentioned, as attending the finding of a general verdict.

Although this provision does not expressly provide that the questions stated to the jury by the Judge shall be in writing, I think that the implication arising from the state of the law at the time of its passage, and the object to be gained by it, and the uncertainty and confusion that would otherwise arise, shew that the intention of the Legislature was that they should be in writing.

If the answers of the jury to the questions submitted to them are not sufficient to enable the Judge to enter judgment

upon, he can submit other questions in writing to them, as was done in *McLaren v. Canada Central R.W. Co.* (1882), 32 C.P. 324, with the approval of that course by the Judicial Committee, but he is not at liberty to interrogate the jury as to their reasons for their answers.

If, however, in this case it is to be taken that the parties and the jury consented to the learned trial Judge saying that he would direct the clerk of the Court to ask the jury, in the event of their returning a verdict for the plaintiff, what negligence they pointed to; and if any effect is to be given to the reasons of the jury, added to their general finding, such reasons must be interpreted by the evidence, the Judge's charge, and their general finding: *Hollins v. Fowler* (1874), L.R. 7 H.L. 757; *Moore v. Connecticut Mutual Fire Ins. Co.* (1881), 6 App. Cas. 644; *Ellyatt v. Ellyatt* (1864), 3 Sw. & Tr. 503; *St. Denis v. Baxter* (1885), 13 O.R. 41, 15 A.R. 387.

And being so interpreted, what the jury meant was that the defendants were guilty of negligence in running the car at too great speed, having regard to the fact that they were running on the wrong track, and reversely, and that the means of signalling and controlling the car, and the motorman, were all at the rear of the car, instead of being, as they should have been, at the front.

Objection was taken that there was no evidence proper to be submitted to the jury of any negligence on the part of the defendants, but in my opinion there was such evidence; which, if believed by the jury, warranted their finding: *White v. Barry R.W. Co.* (1899), 15 Times L.R. 474.

It was objected that Crashley should have turned to the right instead of to the left when he heard the car coming after him, but the rule of the road does not apply as between a street car and a waggon: *Booth's Street Railway Law*, sec. 302.

In my opinion, therefore, the appeal must be dismissed with costs.

OSLER, J.A.:—I agree, though with hesitation, in the result. I should have been better satisfied if a new trial had been ordered, as I cannot be sure that the jury have appreciated the real grounds on which the defendants' liability, under the

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circumstances presented in this case, must rest—that is to say, on proof of negligence beyond the mere fact that the car was run on the track and in the direction in which it had not been usual to run it. The answer of the jury to the question which the learned Judge told them would be put to them, but which in fact was not, and which answer accompanied their finding for the plaintiff, seems to me inofficious and pointless, and leaves me, I must say, somewhat in doubt whether they really considered the case from the point of view I have mentioned, while their omission to find that the speed of the car was excessive, is a pretty strong indication that the plaintiff had made out no case on that ground; and, indeed, the great weight of the evidence shews that he failed to do so. Nevertheless, I am unable to say that the learned Judge really meant to put questions or a question to the jury for the purpose of entering judgment on their findings, as the Judicature Act provides (sec. 112): and that being so, we have merely a general verdict, the legal result of which, according to the well-established rule, cannot be affected by reasons which the jury choose to give for it, or remarks with which they accompany it. These may well, however, form a ground for granting a new trial, as Wilson, C.J., says in *Sheridan v. Pidgeon*, 10 O.R. 632.

In *Dimmock v. North Staffordshire R. W. Co.* (1866), 4 F. & F. 1038, the jury brought in a general verdict for the plaintiff. They were interrogated by the trial Judge as to the acts of negligence relied on by them, and upon their answers he directed a verdict for the defendants. The reporter notes that this was upheld in the Queen's Bench.

It is perhaps difficult to say that there is no evidence from which the jury might have inferred that the men in charge of the car did not give sufficient warning to the plaintiff and his friend that they were coming down on the easterly track, and thus deter them from turning into that track, as they would not improbably do on hearing the car behind them, supposing that it was, according to the usual practice, on the westerly track on which the plaintiff's vehicle was travelling. I doubt very much whether a new trial would, on the evidence, be of any use to the defendants, and on the whole, therefore, concur in dismissing the appeal.

I wish, however, to add, that I do not assent to the view that in putting questions to the jury for the purpose of obtaining answers or findings on which judgment may be entered, the Judge is bound to put such questions in writing.

That may be a convenient, and, no doubt, is the usual course; and, had it been followed by the learned trial Judge, if he really intended to put questions under the Act, would have prevented the difficulties which we have met with in this case. But the statute does not require it, and we have no right to impose it by our decision.

Moss, J.A.:—It would have been more satisfactory either to have allowed the jury to give a general verdict, or, if questions were to be asked, that they should have been put in a more formal way. However, upon the whole case, I think that, as the defendants were using the eastern track in an unusual fashion quite out of the ordinary way in which the public were accustomed to see it used, it lay upon them to take extra precautions and exercise special care to avoid collision with or danger to other vehicles or persons using the roadway.

And there is evidence upon which the jury might find, as I think they have found by their verdict, that the defendants' failure to observe their duty in this respect was the cause of the accident.

That being so, the judgment was rightly entered in the plaintiff's favour, and the appeal should be dismissed.

MACLENNAN, and LISTER, JJ.A., concurred.*

*Affirmed by the Supreme Court of Canada, 32 S.C.R. 239.

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ST. MARY'S CREAMERY COMPANY

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THE GRAND TRUNK RAILWAY COMPANY.

1903

April 14.

Railway—Shipping bill—Bill of lading—Condition requiring insurance—Breach of—Loss of goods—Negligence—Railway Act, 51 Vict., ch. 29, sec. 246 (D).

Under sec. 246 of the Dominion Railway Act, a railway company is precluded from setting up a condition endorsed on a bill of lading relieving the company from liability for damage sustained to goods while in transit, where the damage is occasioned through negligence.

Consignors by their own shipping bill agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of the bill of lading given by the railway company on the shipment of goods, required the consignor to effect an insurance thereon, which, in case of loss or damage, the company were to have the benefit of.

The consignors insured the goods, but afterwards countermanded the insurance:—

Held, that the bill of lading superseded the shipping bill and formed the contract between the parties, and that the railway company under the above section were precluded from setting up the breach of such condition as a ground for relief from liability, where the damage to the goods had been occasioned through negligence.

THIS was an action tried before MEREDITH, J., without a jury, at Stratford, on the 13th January, 1903.

The action was brought to recover damages for the loss of a quantity of butter shipped by the plaintiff from St. Mary's in this Province, to Manchester, England, under a through contract made with the defendants, the Grand Trunk Railway Company.

Idington, K.C., and *L. Harstone*, for the plaintiff,
W. Cassels, K.C., and *Forster*, for the defendants.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts, so far as material, are set out.

April 14. MEREDITH, J.:—This is a case of importance, and of some difficulty.

The plaintiffs are a company engaged in the making of cheese and butter, in large quantities, at St. Mary's, in this Province; their market is largely at Manchester, in England.

* The defendants are a railway company whose roads run through a portion of this Dominion, and portions of some of the adjoining States; and a company which undertakes, among other things, the carriage of goods to different parts of the world, including Manchester.

The plaintiffs' cheese and butter are sent in large quantities to Manchester, upon through contracts made with the defendants. The dealings between the parties in regard to such carriage have been large, and have extended over some length of time. Such dealings have been and are conducted in this manner: the plaintiffs apply to the defendants' agent at St. Mary's for a through rate, and for space upon a steamship, for their goods, and, upon being satisfied as to these things, send them, with a shipping bill, signed in their behalf by their authorized officer or servant, to the defendants' receiving sheds or cars at St. Mary's; upon receipt of the goods, the defendants' agent at St. Mary's delivers to the plaintiffs a formal bill of lading, and thereafter the goods are despatched.

The plaintiffs' course of business has been and is to indorse the bill in favour of their agent at Manchester, and forward it by mail to him, and also to send a telegraphic despatch to him apprising him of the shipment, so as to give him timely notice, in order that he shall arrange for the receiving and sale of the goods, and that he shall effect insurance upon them.

The insurance is of a somewhat different character from that with which most of us are familiar. It was and is effected in Manchester, through the plaintiffs' agent there. A policy, of a very general character, was obtained from the Baden Marine Insurance Company, Limited, of Mannheim, in Germany, dated, at Manchester, on the 13th day of December, 1900, under which that company took upon itself insurance of the plaintiffs to the the amount of £10,281; and agreed and declared that the insurance should be (lost or not lost) at and from "by rail to Portland and for Halifax and for St. John, thence to U.K. ports," and that the subject matter should be and is, upon "butter and for cheese, as interest may appear, to be declared on receipt of invoice, and for bill of lading, at market value with ten per cent. added, limit *per* any one steamer £3,000." There are then printed provisions in which the

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company promises and agrees that the insurance shall commence when the goods are laden on board the said ship or vessel, craft or boat, *as above*, and continue until discharged and safely landed at *as above*, and that the adventures and perils which (among others specified) the insurers are to bear and take, are "all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof." And in the margin is attached a slip, partly printed and partly written, in these words: "In the event of loss or damage prior to declaration held covered at Market value, ten per cent. added." And in the margin are written these words: "This policy does not cover any loss or damage caused by an interruption in the working of the Refrigerator Machines."

Upon the receipt of the telegram announcing the shipment, the plaintiffs' agent at Manchester made "declaration," to the insurers, of the goods, and thereupon they seem to have become covered by the policy.

Under the written words of the policy, and notwithstanding the printed ones quoted, the insurance, after declaration, seems to have been, lost or not lost, by rail from St. Mary's to Portland, and thence to any port in the United Kingdom of Great Britain and Ireland, to which the particular goods were shipped.

The goods in question were delivered to the defendants on the 16th day of April, 1901, to be carried by them, by rail, from St. Mary's to Portland in the State of Maine, and thence, by way of Liverpool, to Manchester.

On the 18th day of that month they were injured, to the extent of about \$488, through the negligence of the defendants' servants, while in transit over the defendants' railway in the Province of Quebec, on the way to Portland.

On the 19th day of the same month, the plaintiffs sent to their agent this message: "We have shipped eighty boxes of butter by the steamship Numidian; declare insurance;" and the insurance seems to have been effected accordingly: neither principal nor agent having any notice of the injury to the goods.

On the 23rd day of the same month, the plaintiffs wrote to their agent to return the bill of lading, and "cancel the declaration you may have made for marine insurance," as they had been advised that the goods had been destroyed in an accident on the way to Portland.

On the 26th day of the same month the plaintiffs wrote again to the agent, countermanding the instructions to cancel the insurance, as "since writing to you on the 23rd, we find on reference to our marine insurance policy that it covers the goods in transit to Portland as well as from that point."

The agent on receipt of the letter of the 23rd, and before receiving that of the 26th, cancelled the declaration, so that, as he says, the plaintiffs are precluded from making a claim upon the insurers.

In these circumstances, the first question is, what was the contract between the parties to this action as to the carriage of the goods? There was obviously a contract of some sort, and something more than one to be implied from the acts of the parties merely. The witness Dickson, in his re-examination, persisted that a contract had to be applied for, that when they wanted space for butter going to a "foreign place" they had to apply for a contract; and another of the plaintiffs' witnesses testified that the defendants' agent would telephone for the papers, saying that if not delivered before the train started, the butter would not go.

It is very clear that the plaintiffs would be bound by the terms of their shipping bill, signed by them and handed to the defendants' agent before he would receive the goods for the defendants as carriers, if accepted by the defendants and not superseded by the bill of lading. This shipping bill requested the defendants, over the plaintiffs' signature, to receive the goods in question "subject to the terms and conditions stated above and to those on the other side of this shipping note." One of the conditions on the other side being:—

"13. In case of any loss or damage to goods for which this company or connecting lines or other carriers may be liable, it is agreed that the company or line or carrier so liable shall be given the benefit of any insurance effected by or for account of the owner of said goods, and shall be subrogated

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in such rights before any demand shall be made on them in respect of such loss or damages, and in case of any liability whatsoever the company shall only be liable for the invoice value of the property at the point of shipment."

The witness Dickson* testified that he had not read, and was not aware of these conditions, but whether that is actually so, or whether in fact he had read them and had forgotten the fact, is immaterial; the plaintiffs would be bound by the terms of their own written request, signed by their duly authorized officer, and delivered to the defendants; and besides this, the officer who signed the request admits having read its terms and conditions, and others may have also.

As to the bill of lading, there seems to be no doubt, upon the authorities, that its terms are binding; that it contains the contract, or at least the written evidence of the contract between the parties: see *Leduc & Co. v. Ward* (1888), 20 Q. B. D. 475; *Parker v. South Eastern R. W. Co.*, and *Gabell v. South Eastern R. W. Co.* (1877), 2 C.P.D. 416; *Watkins v. Rymill* (1883), 10 Q.B.D. 178; and *The North-West Transportation Co. v. McKenzie* (1895), 25 S.C.R. 38.

The witnesses Dickson and Matheson* deny having ever had any knowledge of the terms of the bill of lading; but whether that is so, or whether their memories are at fault, it does not follow that the plaintiffs had not actual notice of them through other of its officers; and even if it could be found as a fact—a finding I would be unable to make—that neither of these witnesses, nor any of the company's officers, had read, or was aware of, the terms of the bill, yet, I cannot doubt, the plaintiffs would be bound by its conditions. They were in the habit of receiving such a document, as a bill of lading, upon all such shipments made by them; they always accepted it, and indorsed it over to their Manchester agent, and otherwise acted upon it, as such; they knew it contained some terms which concerned them, and could not be permitted to urge their own great carelessness, in neglecting their duty to read the document, to relieve them from its effect, if in truth all of their officers had been so inexcusably negligent.

* Dickson was the president and Matheson the secretary of the plaintiffs.

One of the conditions, plainly printed upon the face of the bill of lading, applicable to the service until delivery at the port of Portland, is in these words:—

“VIII. And it is further agreed that the shipper must insure all insurable property, and in case of any loss for which the Grand Trunk Railway Company or its connections are liable, the company or carrier so liable shall be entitled to the benefit of such insurance in estimating the damages to be paid by such carrier, and the insurer shall not be subrogated to any rights against such carrier.”

Primâ facie, it appears that the plaintiffs were fully insured against the loss that has happened, and it is difficult to see, upon the evidence which has been adduced, how the insurers were released by them from liability; or, if so, that such release would relieve the plaintiffs from the whole effect of condition 13, if they are bound by it; and little, if anything, could be said against the fairness of a conclusion that the plaintiffs' action failed by reason of this condition, that is, assuming the insurance to have been validly effected, and either to be still subsisting or to have been released by the plaintiffs. It is true that there was negligence on the part of the defendants' servants, through which a collision of railway trains was caused, and the goods were injured; but accidents will happen upon the best conducted railways, where the best obtainable servants are employed, for collisions and other accidents may sometimes occur from the momentary forgetfulness of one among a multitude of railway servants. They ought not to, and, when they do, the railway companies must take the consequences; but such negligence may well be said, so far as the company is concerned, to be less blameable than that of the president and other officers of the plaintiffs, in (1) never knowing, or having forgotten, the terms of their insurance policy, and failing to look at it to find out, in (2) not insuring before or immediately after shipment, in (3) countermanding the instructions to insure without knowing, and without taking the trouble to see, what their rights were, and, most of all, in (4) failing to withdraw, by telegraph, their countermand, after finding out that the insurance was effective.

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But the case must be dealt with according to law, not according to anyone's notions of fairness; and, as before said, the first question is, what was the contract for the carriage of goods? That is a question of fact, and, upon the whole evidence, I find that the whole contract is contained in the bill of lading; that the terms and conditions of the shipping bill do not form part of it. The shipping bill is to be looked upon as the plaintiffs' offer, not accepted by the defendants, who, in lieu of it, required the terms and conditions of the bill of lading, to which the plaintiffs, by their conduct, assented. That document cannot be looked upon as containing part of the contract only, and the shipping bill as containing additional terms and conditions. The bill of lading is the document intended to contain, and containing, all the terms and conditions. It is so dealt with by the defendants in their pleadings, the shipping bill is not at all there relied upon or mentioned.

Condition 8 of the bill of lading has not been complied with by the plaintiffs. Is it binding upon them, and, if so, does its breach relieve the defendants from liability, or give them a right of action against the plaintiffs? It is, as already found, part of the agreement between the parties. Then, does it apply to a case of loss through negligence attributable to the defendants, and, if so, is it made of no effect by section 246 of the Railway Act?

The cases have gone to an extraordinary length in excluding, from a condition limiting liability, loss occasioned by the negligence of defendants or their servants. The case of *Mitchell v. Lancashire and Yorkshire R.W. Co.* (1875), L.R. 10 Q.B. 256, affords a strong example. There the agreement (it was considered that the plaintiff had assented to the terms of the notice given to him) was that the defendants should hold the goods as warehousemen only, and "at the owner's sole risk," yet it was held that the defendants were liable for loss occasioned by their servants' negligence in not housing the goods, or otherwise sufficiently protecting them from the weather, although the plaintiff knew all along the position and condition of the goods, and neglected to have them removed until after they were injured. As warehousemen the defendants would, apart from the agreement, be liable for

negligence only, and as the words "at the owner's sole risk" were certainly intended to have some meaning and effect, it would have been difficult for me to have come to any other conclusion than that they meant what they said, and so put all risk upon the plaintiff; but that case does not stand alone.

The cases constrain me to hold that condition eight applies to the defendants' liability as insurers, and not to their liability for any negligence attributable to them: see *Puce & Co. v. Union, etc., Co.* (1903), 19 Times L.R. 328; *Steinman & Co. v. Angier Line (Limited)*, [1891], 1 Q.B. 619; *Sutton & Co. v. Ciceri & Co.* (1890), 15 A.C. 144; *Phillips v. Clark* (1857), 2 C.B.N.S. 156; *Fitzgerald v. Grand Trunk R.W. Co.* (1880), 4 A.R. 601. Otherwise I would have considered that "any loss" for which the defendants were liable included a loss caused by negligence attributable to them; in other words, that any loss meant any loss, not any loss except from negligence: see *Dixon v. Riche-lieu Navigation Co.* (1888), 15 A.R. 647, 18 S.C.R. 704; and *Robertson v. Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611, at p. 615.

But assuming that the condition covers loss through negligence, does the Railway Act preclude the defendants from taking advantage of it?

Section 246 is clumsily framed and worded, but, upon all hands, it seems to be now considered that (so far as the question here involved goes) it precludes the defendants from contracting themselves out of liability for negligence in the cases therein provided for—that is, by any notice, condition, or declaration. The only question in such a case as this being, whether the words "notice, condition or declaration" cover the condition in question here—condition eight.

In the *Grand Trunk R.W. Co. v. Vogel* (1885), 11 S.C.R. 612, it was held that they did, a broad interpretation being given to the words "notice, condition or declaration" by a majority of the Judges. That case is quite in point, and, if still a binding authority, is conclusive against the defendants upon this question.

But it is said to have been overruled. I cannot think that it has. It is true that one of the dissenting Judges has consistently, and perhaps it may be said persistently, found

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fault with it, but I have been unable to find any case in which it can be said that the Supreme Court of Canada has adopted and given effect to his views.

In *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611, it was held that the defendants' liability was limited in amount, but though some of the Judges seem to have relied upon the condition there in question as creating the limitation, others seem to have gone upon an *estoppel in pais*; and all seem to have agreed that their decision in that case did not infringe upon the judgment in the *Vogel* case. The Chief Justice put it thus, at p. 615: "Secondly, it appears to me that nothing decided in *Vogel's* case touches the point raised in the appeal now before us."

In the case of *The Queen v. Grenier* (1899), 30 S.C.R. 42, the Chief Justice, in delivering the judgment of the Court, attacked with much vigour the *Vogel* case, saying, at p. 53, that "for the reasons I gave in *Vogel's* case I am of opinion that a wrong construction of the clause in question prevailed by the majority of a single voice;" and "since the case of *Robertson v. Grand Trunk R.W. Co.*, it would seem that *Vogel's* case can scarcely be considered as a binding authority; at all events, I should not hesitate to reconsider it if a similar question arose."

The latter sentence is in discord with that quoted from the *Robertson* case. In the judgment of the Supreme Court the *Grenier* case was not a case similar in its facts to *Vogel's* case, and the Court was free to construe the different enactment, there in question, independently of the latter's authority. The *Vogel* case is, therefore, not overruled, but is yet an authority binding upon this Court.

If, however, I am at liberty to express my opinion upon the question, it is that the *Vogel* case was rightly decided.

The learned Chief Justice's reason for finding fault with it is very clearly and concisely put in these words, at p. 54: "Shortly, it is that the words 'notice' and 'declaration' can only apply to the unilateral act of the party giving the notice or making the declaration, and the meaning of the word 'condition' by itself of doubtful import is determined to refer only to a unilateral proceeding by the words which immediately precede and follow it. This and the history of the legislation as

regards common carriers in which these words were first used convince me that they do not apply to a case like the present."

But I am unable to understand how any unilateral *act* of either party could alter the common law liability of a common carrier, or could make a contract of any character; there surely must be agreement, however that agreement may be proved. As a matter of law, an assent to terms and conditions of which public notice is given, is just as much a contract as one contained in the most formal writing signed by the parties. Without assent, neither notice nor declaration could relieve the carrier. Notice, declaration and condition must each refer to a bilateral *act*—if I may borrow the expression—if those words refer to any effectual limiting of the carrier's liability.

In the Imperial Land Carrier's Act the words are "public notice or declaration;" and in the Imperial Railway and Canal Traffic Regulations Act they are "any notice, condition or declaration," and in each it seems to have been deemed needful to expressly except any "special contract." It is difficult to understand why the limitation of liability contained in the bill of lading in question should be more effectual than one contained in a public notice of which the plaintiff had notice, and to which they assented. The words in the Railway Act—notice, condition, or declaration — were doubtless taken from the Imperial enactment, and the want of any provision exempting special contracts, or special contracts signed by the parties, is significant. It is also very difficult to understand why that limitation which the parties in the bill of lading called a *condition* is different from that which Parliament has called a *condition*.

In the earlier days the limitation of liability was sought generally through public notices. In later days the same thing was generally sought through conditions contained in or indorsed on tickets and bills of lading and like documents. The word condition seems to exactly meet the mischief aimed at, and to have been added to the earlier words "public notice or declaration" for that purpose. The traveller or shipper is even more at the mercy of a railway company through conditions than through notices or declarations, for proof of their having come to his knowledge and of his assent to them is

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easier. I say, at the mercy of the company, because the traveller or shipper has really no practical alternative—unless given a choice between two just and reasonable rates one with and one without liability—for what can he well do if told, you must accept the conditions the company imposes or forego your journey or the forwarding of your goods. The impetuosity of mankind would not brook the latter; few, indeed, there are who will not accept almost any conditions rather than be delayed, and perhaps not unwisely, for the risk is really very little, and there is likely to be neither much consolation nor much profit in an action for damages, against such a litigant, for breach of any common law or other obligation to carry subject to liability for negligence: see Carriers' Act, 2 Geo. IV. and 1 Will. IV., ch. 68, and the Railway and Canal Traffic Regulation Act, 17 & 18 Vict. ch. 3. If at the late date, when the restriction was introduced into our laws, it had been confined to notices or declarations, it would have been practically a dead letter. It is the word "condition" which alone gives it any life and effect: see R.S.C. ch. 66, sec. 98, and 42 Vict. ch. 9, sec. 25, sub-sec. (4), (D) and 37 Vict. ch. 25 (D).

The words of the enactment are amply wide enough to cover this case, and, looking at the law as it was before the enactment, and at the mischief intended to be remedied by it, one is led to the broad, though natural, construction adopted in the *Vogel* case. In England there was the enactment mentioned, limiting carriers and railway and canal companies' unfettered power of contracting themselves out of the liability for negligence, and imposing the burden of determining whether the limitation of liability was just and reasonable upon the Courts. In the United States of America—in probably most of them—there were the decided cases holding, contrary to the law of England and of this country, that common carriers could not contract themselves out of their common law liability for negligence. Between these two conditions Parliament here seems to have chosen the less complicated, and more beneficial for the public, rule prevailing in the United States. To have, by legislation, taken that position which the courts of such States, under the guise of that uncertain quantity "public policy," and by, perhaps, autocratic

rather than judicial powers, had secured for and in the interests of the shipping public.

The provision in our Railway Act seems to me to have been a deliberate rejection of the Imperial enactment, with its consequent litigation, and adoption of the rule prevailing in most of the United States, here, where up to that time no relief of any character had been given as to carriers by land.

The condition in question does not in terms provide that the defendants shall not be liable for their own negligence; but, if that be its effect, it must be within the prohibition; one cannot be permitted to do indirectly that which he is prohibited from doing, unless, indeed, it is permissible to drive a coach and four through any enactment. It would be a curious state of the law if, whilst prohibiting a carrier from contracting himself out of liability for negligence, it permitted him to contract himself into perfect security against all its consequences by requiring the shipper to insure him. Whether in the carriage of such perishable goods as butter, the carrier could charge an increased rate sufficient to insure himself against the consequence of his own negligence, may be a different question, especially if the shipper were given a choice of rates, one with and one without liability.

So that it comes to this: either the condition does not apply to loss through the defendants' negligence, and so is no defence to the action or ground of counterclaim; or that it does so apply, and if so, is made of no effect by the enactment.

Whether condition thirteen is in these respects in the same position as condition eight, I have not to consider, having found that it is not part of the contract. If it were aimed only at the case of the plaintiffs being twice paid for the one loss, it would be a very proper provision; but it is very much further reaching, and might render invalid insurance effected without notice, to the insurers, of it: see *Tate & Son v. Hyslop* (1885), 15 Q.B.D. 368.

The following cases in the courts of the United States of America may be very usefully read, bearing in mind always, however, the fact that many of such courts have, in the name of public policy, undertaken to interfere with and to change the contracts of parties, perfectly competent to contract, in a

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manner which here no body without legislative power could do: *Willock v. Pennsylvania R.W. Co.* (1895), 166 Penn. St. 184; *Rintoul v. New York Central R.W. Co.* (1883), 17 Fed. R. 905; *Providence Ins. Co. v. Moore* (1893), 150 U.S. 99, *The Titania* (1883), 19 Fed. 101; and the other cases referred to in Schouler on Bailments and Carriers, 3rd ed., pars. 450 and 454-5; Elliott on Railroads, vol. 4, p. 2233, par. 1509; and the Cyclopædia of Law and Procedure, vol. 6, p. 397.

There must be judgment for the plaintiff, and, as agreed upon between the parties, \$488.08 damages, with costs of action.

G. F. H.

END OF VOLUME V.

APPENDIX.

Reported cases from Ontario disposed of by the Supreme Court of Canada from 1st of March, 1903, to 1st of July, 1903.

HENNING V. MACLEAN, 4 O.L.R. 666.—Affirmed 33 S.C.R. 305.

MONTREAL AND OTTAWA R.W. CO. V. CITY OF OTTAWA, 4 O.L.R. 56.—Affirmed 33 S.C.R. 309.

THORNE V. PARSONS, 4 O.L.R. 682.—Affirmed (sub. nom. *Thorne v. Thorne*) 33 S.C.R. 376.

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ACCOUNT.

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APPEAL.

1. *Court of Appeal—Late Entry—Refusal of Consent—Confirmation—Responsibility for Delay—Costs.*]—The defendants on the 19th May gave notice of an appeal to the Court of Appeal from a judgment delivered on the 22nd April, and gave security on the 22nd May. Reasons of appeal were not served till the 10th September, and reasons against appeal not till the 13th October. The next sitting of

the Court of Appeal was set for the 10th November. The appeal case was not prepared in time to enter the case on the 6th November, and the plaintiff's solicitor refused to consent to its being entered on the 10th for the sittings beginning on that day. The case was entered without consent on the 17th November, and a motion was made to confirm the entry:—

Held, that the plaintiff's solicitor should have consented to the proposed entry on the 10th November, and the subsequent entry should be confirmed; and, as both parties were nearly equally blamable for delay, there should be no costs. *McLaughlin v. Mayhew*, 114.

2. *Court of Appeal—Leave to Appeal—Solicitor—Payment by Salary—Costs—Taxation.*]—The solicitor of a municipal corporation was appointed under the terms of a by-law which provided for his receiving a yearly salary of \$1,800 for all services performed by him, including costs of litigation incurred on behalf of the corporation, and any costs awarded to the corporation were to be paid over to the city treasurer. This by-law was amended by a by-law providing that all costs payable to the corporation in any action should

be paid to the solicitor as part of his remuneration in addition to his salary. After the passing of the amending by-law the corporation claimed to have the right to tax profit costs in an action against the corporation which had been dismissed with costs prior to the passing of such amending by-law.

Leave to appeal to the Court of Appeal from a judgment of a Divisional Court refusing to allow such profit costs having been moved for:—

Held, that, having regard to the litigation and the decisions on the subject, leave should not be granted. *Jarvis v. Great Western R. W. Co.* (1859), 8 C.P. 280, *Stevenson v. Corporation of Kingston* (1880), 31 C.P. 333, and *Meriden Britannia Co. v. Braden* (1896), 17 P.R. 77, referred to. *Ottawa Gas Co. v. City of Ottawa*, 246.

3. *Divisional Court—County Court Appeal—Final Order.*]—A motion by the defendant to set aside a judgment in a county court as irregular and void was dismissed by the county court Judge, who gave the defendant leave, on payment of \$5, to move on the merits for leave to defend:—

Held, that this was a final order and that an appeal lay therefrom. *O'Donnell v. Guinane* (1897), 28 O.R. 389, distinguished. *Voight Brewery Co. v. Orth*, 443.

4. *Supreme Court of Canada—Extension of Time—Intention to Appeal—Suspension of*

Proceedings—Merits.]—Upon an application to extend the time for appealing from the Court of Appeal to the Supreme Court of Canada the applicant must shew a *bonâ fide* intention to appeal, held while the right to appeal existed, and a suspension of further proceedings by reason of some special circumstances. No such case having been made out here, and the Court not being impressed with the merits of the defence, leave to extend the time was refused.

In re Manchester Economic Building Society (1883), 24 Ch. D. 488, followed. *Smith v. Hunt*, 97.

See ARBITRATION AND AWARD, 3—COSTS, 7—CRIMINAL LAW, 1—PARLIAMENTARY ELECTIONS, 1, 3—PLEADING, 1—PRACTICE, 3.

APPORTIONMENT.

See DAMAGES—WASTE.

ARBITRATION AND AWARD.

1. *Order for Leave to Enforce Award—Time—Arbitration Act, sec. 45—Motion to Set aside Award.*]—An application under sec. 13 of the Arbitration Act, R.S.O. 1897, ch. 62, for an order giving leave to enforce an award, need not be made within six weeks after the publication of the award.

Section 45 of the Act does not apply to such an application, but only to applications to set aside awards.

An order under sec. 13 is necessary when the reference has been made out of Court.

Objections properly the subject of a motion to set aside the award were not given effect to upon appeal from an order under sec. 13. *Re Lloyd and Pegg*, 389.

2. *Stating Case — Matter “Arising in the Course of the Reference” — Revoking Submission — Arbitration Act — R.S.O. 1897, ch. 62, sec. 41.*]

—Arbitrators were appointed under the arbitration clause in an agreement between two companies, whereby, *inter alia*, one agreed to provide the other daily with a certain quantity of cordwood, which the latter agreed to carbonize into charcoal, and to deliver to the former to the maximum quantity of 85,000 bushels per month. The arbitration clause provided that “in case of any dispute . . . arising between the parties in regard to the meaning or construction of this agreement . . . or of the mutual obligations of the parties . . . or of any other act, matter or thing relating to, or concerning the carrying out of the true spirit, intention, or meaning of these presents, the same shall be determined by arbitration.” Disputes arising between the parties, one of the claims referred to the arbitrators was for damages for alleged short delivery of charcoal, such shortage being claimed whatever the proper construction of the agree-

ment in that regard. On application by one of the parties, under sec. 41 of the Arbitration Act, R.S.O. 1897, ch. 62, for a direction to the arbitrators to state a special case as to what was the true construction of the contract as to the amount of charcoal called for per month under it—a matter upon which they had reached and announced a conclusion:—

Held, that the claim referred to leaving the proper construction of the agreement open, this was a question of law “arising in the course of the reference” within the meaning of the said section, and a special case might properly be directed as to it.

Held, also, that a special case having been directed as to this, the principal question, it might properly be made to include two other questions in dispute, though, had they been the only questions which the applicants desired to have stated, it would not have been proper to direct the case as to them.

A party to a reference is not entitled *ex debito justitiæ* to have a special case directed whenever a question of law arises in the course of a reference. This is a matter resting in the discretion of the Court.

There is no general rule that where the arbitrators are specially qualified to decide the question of law, this direction should not be given, at all events where the arbitrators have ruled upon the question.

Semble, that different considerations apply to the exercise

of the discretion to give leave to revoke a submission (R.S.O. 1897, ch. 62, sec. 3), a discretion which is to be exercised only under exceptional circumstances. *Re Rathbun Co. of Deseronto and Standard Chemical Co. of Toronto*, 286.

3. *Submission — Appointment of Sole Arbitrator—Arbitration Act, R.S.O. 1897, ch. 62, sec. 8—Appeal—Order of Judge in Chambers.*]—A submission contained in a policy of insurance provided “that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient.”—

Held, reversing the decisions of a Divisional Court, 3 O.L.R. 93, and of STREET, J., 2 O.L.R. 301, that the submission was not one providing for a reference “to two arbitrators, one to be appointed by each party,” within the meaning of the Arbitration Act, R.S.O. 1897, ch. 62, sec. 8, and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator.

Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls (1901), 2 O.L.R. 585, approved.

Held, also, that the order of STREET, J., dismissing an appli-

cation to set aside the appointment of a sole arbitrator, was not made by him as *persona designata*, but was a judicial order from which an appeal lay. *Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation, Re Faulkner*, 609.

See COMPANY, 2—INSURANCE, 3—LANDLORD AND TENANT, 1, 4—SCHOOLS.

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See RAILWAY, 4.

ASSESSMENT AND TAXES.

Tax Sale—Invalidity—Onus —Proof of Taxes in Arrear—Omission of Clerk to Furnish Treasurer with Assessor's Return —Irregularity —Action not Commenced within Three Years—Pleading.]—In an action brought on the 23rd April, 1902, for a declaration that a tax sale and conveyance under which the defendants claimed title to, and were in possession of, a certain town lot, were illegal and void as against the plaintiffs, the rightful owners, the plaintiffs proved a sufficient paper title. It was also proved that one of the defendants was in possession and had erected a valuable building, claiming title under a sale by the town treasurer, made on the 7th October, 1898, for arrears of taxes for 1895, 1896, and 1897, and a deed made in pursuance thereof on

the 15th November, 1899, registered 12th December, 1899, by the proper officials to the assignee of the tax purchaser, and a subsequent conveyance, duly registered, to the defendant in possession:—

Held, that the onus of proof of the invalidity of the tax title rested on the plaintiffs.

Taxes for the whole period of three years next preceding the 1st January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day, the lot was, by sec. 152 of the Assessment Act, R.S.O. 1897, ch. 224, liable to be sold in 1898 for such arrears.

The proceedings leading up to the sale were substantially regular, with one exception, the omission of the clerk of the municipality to furnish the treasurer, as he is required to do by the last clause of sec. 153, with a true copy of the list furnished by the latter under sec. 152, with the assessor's return, certified to by the clerk under the seal of the corporation:—

Quære, whether this requirement of sec. 153 was of so essential a character as, conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action came into operation.

Love v. Webster (1895), 26 O.R. 453, distinguished.

Held, however, that as in this case the taxes had been legally

imposed the omission worked no injury to the plaintiffs, who had all the notices and delays to which they were entitled, and in respect to whose land all the other conditions essential to a valid tax sale existed, and, as the action was brought more than three years after the sale and more than two years after the deed, the defendants were entitled to rely upon secs. 208 and 209 of the Assessment Act as a defence. *Kennan v. Turner*, 560.

ATTACHMENT OF DEBTS.

1. *Interest of Residuary Legatee—Division Court—Receiver.*—A primary creditor in a division court, by garnishee summons served on the executors, attached the interest of a residuary legatee in the estate of a testator, who had died within a year of the attachment. A receiver was subsequently appointed in a High Court action to receive his interest. The division court Judge gave judgment against the garnishees.

An appeal to a Divisional Court was allowed on the ground that such interest was not attachable under sec. 179 of the Division Courts Act, R.S.O. 1897, ch. 60. *Hunsberry v. Kratz*, 635.

2. *Rent Payable under Lease to Administratrix for Benefit of Others—Devolution of Estates Act.*—Plaintiffs, claiming

as heirs at law of their father and owners of a lot of land, brought an action for specific performance, which was dismissed with costs. After the trial one of the plaintiffs, G.R., died, and probate of his will was granted to a sister and co-plaintiff, and the action was revived, in the names of the remaining plaintiffs and the executrix, and an appeal against the judgment was dismissed with costs.

It appeared that G.R. owned one half of the lot and the father of the plaintiffs the other half, and that the lot had been leased to a tenant by one of the plaintiffs as administratrix of the father, who died in or before 1896, and by the executrix of G.R. No caution was registered under the Devolution of Estates Act:—

Held, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs.

Macaulay v. Rumball (1869), 19 C.P. 284, commented on.

Judgment of STREET, J., reversed, and judgment of the Master in Chambers restored. *McDonald v. Sullivan*, 87.

See DIVISION COURTS.

BANKS AND BANKING.

Cheques—Life Insurance—Fraud of Agent—Payment by Bank—Right of Company to Recover Amounts Paid.]—N. was the assistant superintendent of a life insurance company, as well as its local agent at one of

its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five the insurances subsequently lapsed, of which the company were kept in ignorance. Afterwards N., representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, when cheques for the respective amounts, made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt, to see the payees and procure discharges from them. N. was in the habit of certifying to the bank the genuineness of the signatures of the payees of the cheques in payment of claims, and most of the cheques in question had been certified to by him. The indorsements of the payees' names were forged by N., and the cheques presented to the bank and paid in good faith, to whom or how did not appear, the amounts thereof being charged to the company's account:—

Held, that the company was affected by what had been done by N., so as to preclude it from disputing the right of the bank to pay the cheques and charge the company with the amounts. *London Life Ins. Co. v. Molsons Bank*, 407.

BENEVOLENT SOCIETY.

See INSURANCE, 2.

BILLS OF EXCHANGE.

Accommodation Maker—Renewal Note Obtained by Fraud—Right to Sue on Original Note—Division Court—Power to Amend—Division Court Rule 4—Evidence—Entries in Books.—The defendant joined in a promissory note, as the payees knew, for the accommodation of his co-maker. When it became due, the latter tendered a renewal note, purporting to be signed by the defendant, which the payees accepted and gave up the original note stamped "paid." The primary debtor became insolvent and died, and the payees afterwards sued the defendant on the renewal note only, in a division court, when the defendant swore he never signed it, but, nevertheless, there was verdict and judgment for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the Judge, at the trial, allowed the plaintiffs to claim in the alternative upon the original note, as well as on the renewal, and to amend their claim accordingly. A verdict was then returned for the plaintiffs on the original note:—

Held, that the division court Judge had jurisdiction, under Rule 4 of the Division Courts, to amend the plaintiffs' claim as he had done.

Held, also that the renewal

note being a forgery, so far as the defendant's signature was concerned, and the plaintiffs, therefore, having been induced by the fraud of the primary debtor to give him up the original note, the plaintiffs retained a right to recover in equity on the latter.

Held, also, that a witness was entitled to refer to entries in the books of the primary debtor, made by him or under his direction, to refresh his memory. *Matthews & Co. v. Marsh*, 540.

BILLS OF LADING.

See RAILWAY, 1.

BOND.

See SHERIFF.

BRIDGE.

See WAY, 1.

BUILDING SOCIETY.

Mortgage—Mortgagor Becoming Shareholder—Liability for Losses.—It was held that, under the mortgage in question in this case and the by-laws and rules of the defendants and their predecessors in interest applicable thereto, the plaintiff was entitled to a discharge of his mortgage, given in form as collateral security for the payment of shares subscribed for by him, upon payment of the principal and interest as therein provided; and that the defendants could not charge against the mortgage a share of losses incurred in the management of the company.

Williams v. Dominion Permanent Loan Co. (1901), 1 O.L.R. 532, distinguished.

Judgment of *MACMAHON, J.*, 3 O.L.R. 191, reversed. *Lee v. Canadian Mutual Loan and Investment Co.*, 471.

BY-LAWS.

See *COMPANY*, 1—*MUNICIPAL CORPORATIONS*.

CARRIERS.

See *PARTIES*, 1—*RAILWAY*.

CASES.

Babcock v. Standish (1900), 19 P.R. 195, followed.]—See *COSTS*, 3.

Bell v. Landon (1881), 9 P.R. 100, distinguished.]—See *COSTS*, 4.

Boys' Home v. Lewis, 3 O.L.R. 208, varied.]—See *WILL*, 8.

Brown v. Hose (1890), 14 P.R. 3, distinguished.]—See *COSTS*, 2.

Brown v. Toronto General Trusts Corporation (1900), 32 O.R. 319, referred to.]—See *REVENUE*, 2.

Canadian Pacific R.W. Co. and City of Toronto, In re, 4 O.L.R. 134, reversed in part.]—See *LANDLORD AND TENANT*, 3.

Cartwright Public School Trustees and Township of Cartwright, Re, 4 O.L.R. 272, affirmed.]—See *SCHOOLS*.

Compton v. Bloxham (1845), 2 Coll. 201, distinguished.]—See *EXECUTORS AND ADMINISTRATORS*.

Deyo v. Brundage (1856), 13 How. Pr. 221, specially referred to.]—See *DEFAMATION*, 1.

Elston v. Rose (1868), L.R. 4 Q.B. 4, followed.]—See *DIVISION COURTS*.

Evans v. Jaffray (1901), 1 O.L.R. 614, applied.]—See *PARTIES*, 1.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation, Re Faulkner, 2 O.L.R. 301, 3 O.L.R. 93, reversed.]—See *ARBITRATION AND AWARD*, 3.

Ferguson v. County of Elgin (1893), 15 P.R. 399, followed.]—See *CONTEMPT OF COURT*.

Fry v. Ernest (1863), 9 Jur. N.S. 1151, followed.]—See *CONTEMPT OF COURT*.

Helm v. Town of Port Hope (1875), 22 Gr. 273, followed.]—See *MUNICIPAL CORPORATIONS*, 9.

Hoover v. Wilson (1897), 24 A.R. 424, referred to.]—See *EXECUTORS AND ADMINISTRATORS*.

Howland v. Dominion Bank (1892), 15 P.R. 56, distinguished.]—See *PRACTICE*, 4.

James v. Grand Trunk R.W. Co. (1901), 31 S.C.R. 420, distinguished.]—See *RAILWAY*, 6.

Jarvis v. Great Western R.W. Co. (1859), 8 C.P. 280, referred to.]—See *APPEAL*, 2.

Johnston v. Consumers' Gas Co. (1895), 27 O.R. 9, not followed.]—See *COMPANY*, 3.

Lee v. Canadian Mutual Loan and Investment Co., 3 O.L.R. 191, reversed.]—See *BUILDING SOCIETY*.

Love v. Webster (1895), 26 O.R. 453, distinguished.]—See *ASSESSMENT AND TAXES*.

Macaulay v. Rumball (1869), 19 C.P. 284, commented on.]—See ATTACHMENT OF DEBTS, 2.

Mair v. Cameron (1899), 18 P.R. 484, distinguished.]—See PRACTICE, 4.

Manchester Economic Building Society, In re (1883), 24 Ch. D. 488, followed.]—See APPEAL, 4.

Meriden Britannia Co. v. Braden (1896), 17 P.R. 77, referred to.]—See APPEAL, 2.

Metallic Roofing Co. of Canada v. Local Union No. 30 Amalgamated Sheet Metal Workers' International Association, 5 O.L.R. 424, followed.]—See CONTEMPT OF COURT.

Monro v. Toronto R.W. Co., 4 O.L.R. 36, reversed.]—See PARTITION.

Neely v. Peter, 4 O.L.R. 293, varied.]—See WATER AND WATERCOURSES.

O'Donnell v. Guinane (1897), 28 O.R. 389, distinguished.]—See APPEAL, 3.

Ontario Express and Transportation Co., In re (1894), 25 O.R. 587, commented on.]—See COMPANY, 1.

Ontario Lands and Oil Co. v. Canada Southern R.W. Co. (1901), 1 O.L.R. 215, followed.]—See RAILWAY, 2.

Patterson v. Fanning (1901), 2 O.L.R. 462, distinguished.]—See NEGLIGENCE.

Pounder v. North Eastern R.W. Co., [1892] 1 Q.B. 385, discussed.]—See RAILWAY, 4.

Quigley v. Waterloo Manufacturing Co. (1901), 1 O.L.R.

606, applied.]—See PARTIES, 1.

Regina ex rel. Adamson v. Boyd (1868), 4 P.R. 204, followed.]—See MUNICIPAL CORPORATIONS, 3.

Regina ex rel. Rollo v. Beard (1865), 3 P.R. 357, followed.]—See MUNICIPAL CORPORATIONS, 3, 4.

Rex ex rel. Zimmerman v. Steele, 5 O.L.R. 565, followed.]—See MUNICIPAL CORPORATIONS, 4, 5.

South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord, [1897] 2 Ch. 487, followed.]—See PLEADING, 2.

South Riding County of Perth (1895), 2 E.C. 30, followed.]—See PENALTIES AND PENAL ACTIONS, 3.

Spurrier v. La Cloche, [1902] A.C. 446, followed.]—See INSURANCE, 3.

Stevenson v. Corporation of Kingston (1880), 31 C.P. 333, referred to.]—See APPEAL, 2.

Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls, Re (1901), 2 O.L.R. 585, approved.]—See ARBITRATION AND AWARD, 3.

Taff Vale R.W.Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426, distinguished.]—See PARTIES 4.

Taylor v. Caldwell (1863), 3 B. & S. 826, distinguished.]—See CONTRACT, 2.

Tomlinson v. Northern R.W. Co. (1886), 11 P.R. 419, 526, distinguished.]—See COSTS, 7.

Toronto General Hospital v. Denham (1880), 31 C.P. 207, followed.]—See LANDLORD AND TENANT, 2

Toronto General Trusts Corporation v. White, 3 O.L.R. 519, varied.]—See LANDLORD AND TENANT, 4.

Uffner v. Lewis, 3 O.L.R. 208, varied.]—See WILL, 8.

West Wellington Case (1895), 2 E.C. 16, distinguished.]—See PARLIAMENTARY ELECTIONS, 2.

Wilding v. Sanderson, [1897] 2 Ch. 534, specially referred to.]—See PRACTICE, 1.

Williams v. Dominion Permanent Loan Co. (1901), 1 O.L.R. 532, distinguished.]—See BUILDING SOCIETY.

Yates v. Yates (1860), 28 Beav. 637, followed.]—See WASTE.

Youghal Election (1869), 3 Ir.R.C.L. 530, 1 O'M. & H. 291, followed.]—See PARLIAMENTARY ELECTIONS, 2.

CERTIORARI.

See CRIMINAL LAW, 2.

CHEQUES.

See BANKS AND BANKING.

CHURCH.

Religious Institutions—"Acquisition" of Land—*Life Estate*—*Seven Years' Holding*—*When Commencing*.]—The seven years during which a religious institution may hold land after its "acquisition" under sec. 19 of R.S.O. 1877, ch. 216 (now sec. 24 of R.S.O. 1897, ch. 307) does not com-

mence to run in the case of a devise of a reversion dependent upon a life estate until the expiry of the life estate. *Re Naylor*, 153.

See PARTIES, 3—WILL, 1.

COMPANY.

1. *Appointment of Manager*—*Provisional Directors*—*Absence of By-law and Seal*—*Payment for Services Rendered*—*R.S.O. 1897, ch. 191, secs. 47, 48.*]—Plaintiff was appointed by the board of provisional directors of a company incorporated under the Ontario Joint Stock Companies Act to be a director and was at the same time appointed manager at a salary. In an action for the salary or compensation in which it appeared that the services rendered had not resulted in any benefit to the company, which had never gone into operation:—

Held, that as plaintiff had not been appointed manager, nor his payment provided for by by-law approved of by the shareholders, and as there was no contract under the corporate seal, he could not recover.

In re Ontario Express and Transportation Co. (1894), 25 O. R. 587, commented on.

Judgment of LOUNT, J. reversed. *Birney v. Toronto Milk Co.*, 1.

2. *Sale of Gas Works to Municipality*—*Arbitration as to Price*—*Franchise*—*Ten per Cent. Addition.*]—By 54 Vict. ch. 107 (O.) the company was protected against compulsory

parting with its works and property to the city until May, 1911; but by an agreement made in 1896 it was provided that, upon the city giving one year's notice, it should have the option of purchasing and acquiring all the works, plants, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business. The city having exercised its option:—

Held, affirming the decision of LOUNT, J., 3 O.L.R. 637, that, in ascertaining the price to be paid by the city, the arbitrators were right in allowing nothing for the value of the earning power or franchise of the company, and in refusing to add ten per cent. to the price as upon an expropriation under R.S.O. 1887, ch. 164, sec. 99. *Re City of Kingston and Kingston Light, Heat, and Power Co.*, 348.

3. *Toronto Gas Company—Increase of Capital—Statutory Restrictions—Payments to Directors—Dividends—Reserve Fund—Investment in Business—Plant and Buildings Renewal Fund—Reduction in Price of Gas—Audit by Municipality—Charges for Depreciation or Loss—Construction of Statute.*—By 50 Vict. ch. 85 (O.), "An Act to further extend the powers of the Consumers' Gas Company of Toronto," the

defendants were given authority to increase their capital stock to \$2,000,000.

By sec. 4 it was provided that the new stock should be sold, and that all surplus realized over the par value of the shares should be added to the reserve fund until it should be equal to one-half of the paid-up capital stock, the true intent and meaning being that the defendants might at all times have a reserve fund equal to but not exceeding one-half of the then paid-up capital, which fund might be invested in specified securities.

By sec. 6 it was enacted that there should be created and maintained by the defendants a plant and buildings renewal fund, to which should be placed each year 5 per cent. on the value at which the plant and buildings in use by the defendants stood in their books at the end of their then fiscal year, and that all usual and ordinary repairs and renewals should be charged against this fund.

By sec. 7, any surplus of net profit remaining at the close of any fiscal year, after payment of (1) fees to the directors not exceeding \$9,000 per annum, (2) a dividend at ten per cent. on the paid-up capital, (3) the establishment and maintenance of the reserve fund, and (4) providing for the plant and buildings renewal fund, was to be carried to a special surplus account, and whenever the amount of such surplus should be equal to five cents per 1,000

cubic feet on the quantity of gas sold during the preceding year, the price of gas should be reduced for the current year at least five cents per 1,000 cubic feet.

By sec. 8, if in any year the net profits should not be sufficient to meet the requirements of the defendants for the payment of fees, dividends, and provision for the plant and buildings fund (as in sec. 7), the directors were empowered, in their discretion, to draw upon the reserve fund to the extent of such deficiency, and to restore from earnings any amount so drawn, but it was provided that the reserve fund should not otherwise be drawn upon.

By sec. 9, the plaintiffs were authorized to be parties to the annual audit of the defendants' affairs:—

Held, that the defendants were not bound to keep the reserve fund, as an actual separate sum of money, apart from their other property, and invested in the securities mentioned in sec. 4, but were at liberty to use it in their business, as they did from year to year, without objection by the plaintiffs' auditors; and were not bound to carry to the credit of the fund its share of the increase in the value of the defendants' property which it had helped to acquire while invested in the business.

2. That charges for decrease in the value of gas mains, for iron gas lamps which became

useless, and for gas meters destroyed, were not charges for renewal or repair, but for depreciation and loss, and did not come within sec. 6 so as to be chargeable to the plant and buildings renewal fund.

3. That under sec. 6 the defendants were entitled to contribute to the plant and buildings renewal fund the five per cent. authorized, even although it should not appear necessary to do so for the purposes for which the fund was to be used.

These sections were construed in *Johnston v. Consumers' Gas Co.* (1895), 27 O.R. 9, upon a special case, but the decision was reversed (23 A.R. 566, [1898] A.C. 447), although not on the question of construction:—

Held, that the Court was not bound by the views expressed in that case. *City of Toronto v. Consumers' Gas Co. of Toronto*, 494.

4. *Winding up—Transfer of Stock—Power of Attorney—Scope of—Payment to Directors—Validity of.*—The directors of a company, under the belief, which was erroneous, that there was no unallotted stock, procured, through an agent, powers of attorney from several persons, which were pasted by the secretary in the transfer book. These powers authorized the agent "to receive from the vendors a transfer" of a specified number of

"shares in the company, purchased by me from him," and "to sign in the books of the company my name to the acceptance and transfer" thereof. One of the appointors, whose power called for three shares, subsequently signed an application therefor, and, on his payment for the stock, received a stock certificate. Another appointor, whose power of attorney called for five shares, forthwith paid the company for two and received a stock certificate therefor, and, on his subsequently paying for the remainder, received stock certificates therefor. The other appointors also paid for the amount of shares specified in their powers and received stock certificates, no transfer then being made of the stock by any vendor nor any acceptance thereof, what took place amounting to an allotment of stock by the company. Several months afterwards, P., an original shareholder and provisional director and subsequently a director and superintendent of the company, becoming aware of the existence of these powers of attorney, and of no transfers having been made thereunder, filled in, opposite the names of the various appointors, transfers of stock from him to them, to the numbers specified in their powers, procuring the agent, as their attorney, to accept the transfers, for which the agent was paid by the company at P.'s instance \$60 for alleged commission. On the winding up of the company:—

Held, by the Court of Appeal, that neither the transfers of stock made by P. nor the \$60 payment could be supported, and that P. must be placed upon the list of contributories.

The judgment of MEREDITH, C.J., limiting the liability of P. to certain of the shares referred to, and as to his non-liability for the \$60, reversed.

Shortly after the incorporation of the company, a meeting of the provisional directors, who were then the only shareholders, was held, when a resolution was passed under which P. was paid \$300 out of capital, for alleged services, it not appearing that any service had then been rendered by him. The minutes of this meeting were confirmed at a subsequent shareholders' meeting. At the time no profit had been made by the company, and, so far as the books shewed, nothing had been paid on account of the stock. No by-law was passed authorizing these payments:—

Held, that the payment of \$300 could not be supported.

Judgment of MEREDITH, C.J., reversed. *Re Publishers' Syndicate, Paton's Case, 392.*

See BUILDING SOCIETY—EVIDENCE, 3.

COMPENSATION.

See EXECUTORS AND ADMINISTRATORS.

CONSPIRACY.

See PLEADING 2.

CONSTITUTIONAL LAW.

1. *Ferries--Dominion and Provinces—Jura Regalia—Public Harbours—River Improvements—62 & 63 Vict. ch. 50, sec. 9 (c) (D.)*—The right to create and license a ferry, having been one of the *jura regalia* or royalties which belonged to the several Provinces at the Union, continued to belong to them after Confederation, as declared by sec. 109 of the B.N.A. Act, notwithstanding sec. 91, sub-sec. 13, giving the Dominion legislative power in relation to ferries; and therefore a lease of a ferry between the town of Sault Ste. Marie in the Province of Ontario, and the town of Sault Ste. Marie in the State of Michigan, U.S.A., granted by the Dominion Government, was declared to be invalid.

Held, also, that, even if the St. Mary's river at the point in question were a public harbour, yet this would not give the Dominion Government any right to grant any exclusive right over it, such as the ferry in question.

Held, however, that the St. Mary's river at the point in question is not a public harbour. Something more is necessary to convert an open river front into a public harbour, within the meaning of sec. 108 of the B.N.A. Act, than the erection along

it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods.

Held, also, that the existence of improvements belonging to the Dominion Government in the river bed in front of the town of Sault Ste. Marie afforded no reason for the entire control of the ferry across the river being held to be in the Dominion Government, though the Dominion Parliament or Government have undoubtedly a right to make laws or rules with regard to the ferry in question, or other ferries, for the purpose of regulating them and of preventing them from interfering with public harbours and river improvements of the Dominion.

The Dominion statute incorporating the Algoma Central and Hudson Bay Railway Company, authorizes it for the purposes of its undertaking to acquire and run steam and other vessels for cargo and passengers upon any navigable water which its railway may connect with:—

Held, that under the very large and general words of this clause the railway company was not bound to restrict the passengers and cargo transported by its vessels to persons and goods intended to be carried on its railway line.

Semble, also, that on the proper construction of the Dominion Act respecting ferries, R.S.C. 1886, ch. 97, sec. 11, any vessel which is regularly entered or cleared by

the officers of His Majesty's Customs at any port in Canada, may convey passengers and goods for hire and profit, notwithstanding that an exclusive right of ferry has been granted within the limits within which it does so. *Perry v. Clergue*, 357.

2. *Interest—R.S.C. 1886, ch. 127, sec. 7—Mortgage Running Over Five Years—Payment—Tender of Amount—Agency.*]—Action to compel a mortgage in Great Britain under the provisions of R.S.C. 1886, ch. 127, sec. 7, to accept the principal money and interest due on a ten year mortgage, which had run over six years:—

Held, that the section is *intra vires* of the Dominion Parliament and is not restricted in its application to such mortgages as are mentioned in sec. 3 of the Act, but applies to every mortgage on real estate executed after the 1st July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage."

Held, also, that the words of sec. 25 of ch. 205, R.S.O. 1897, are wide enough to apply to mortgages executed prior to the passing of that Act.

Held, also, that the loan having been made, the property being situate, and the mortgage giving the option of payment, in Canada, the law of Canada must govern in relation to the contract and its incidents, and

that the tender made as described in the judgment was sufficient. *Bradburn v. Edinburgh Life Assurance Co.*, 657.

See INTOXICATING LIQUORS.

CONTEMPT OF COURT.

Stay of Proceedings—Party Appealing in Contempt—Rights of Parties in Contempt—Unincorporated Association—Parties—Service.]—Motion by the plaintiff to stay a pending appeal from an order dismissing an application to set aside service on an individual for the defendant federation, on the ground that the federation were not an incorporated body or a partnership and could not be served as a body, for the reason that the federation were in contempt for disobedience of an injunction:—

Held, following *Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Ass'n.*, 5 O.L.R. 424, that the federation were not a body capable of being sued or being served, and were not capable of being enjoined or of committing a contempt; and that, as the very object of the appeal was to determine whether they could be sued and served with process, it could not be determined whether a contempt had been committed without hearing the appeal.

Held, also, that the rule is not universal, that persons guilty of contempt can take no

step in the action; a party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself; and, as the defendants here were ordered to appear within ten days, on pain of having judgment signed against them, they had the right to shew, if they could, that the service upon them was not permitted by the practice.

Motion refused under the circumstances without costs. *Fry v. Ernest* (1863), 9 Jur. N.S. 1151, and *Ferguson v. County of Elgin* (1893), 15 P.R. 399, followed. *Small v. American Federation of Musicians*, 456.

CONTRACT.

1. *Manufacture of Machinery — Special Purpose — Warranty — Defects — Damages — Loss of Profits.*] — Plaintiffs agreed to manufacture a goring loom fit for certain special work required by the defendants, of which purpose the plaintiffs were aware, and to deliver it by a certain time. The machine was not delivered for about a month after the time fixed, and when delivered was imperfect in not having certain fittings and in other ways necessary for its proper working.

The defendants, after applying to the plaintiffs to make good the defects, had to do so themselves.

In an action for the price:—

Held, that the defendants should be allowed the sums paid in supplying the missing por-

tions of the machine and for the services of an expert to put it in working order.

Held, also, that, notwithstanding the property in the loom by the contract remained in the plaintiffs until paid for, as they never had supplied a machine properly constructed to do the work required of it, there was a warranty, express or implied, that it should be fit for such purpose; and that, as the defendants, although they did their best to remedy the defects, were prevented from earning what they would have earned if the loom had been complete, the plaintiffs were liable for loss of profits.

Judgment of MacMahon, J., reversed in part. *Crompton and Knowles Loom Works v. Hoffman*, 554.

2. *Supply of Electric Power — Continued Existence of Property — Condition Precedent.*] — Where under the terms of an agreement the plaintiffs were to supply the defendants with electric current to a specified amount of horse power in the premises of the defendants, to be used by them for operating their machinery and for use in their business, and for no other purpose:—

Held, that such limitation was for the purpose of confining the use of the power to the defendants' premises, and not to any existing mill thereon, and the fact that such mill was afterwards destroyed by fire did not dispense with the

defendants' obligation to receive and pay for the power.

Taylor v. Caldwell (1863), 3 B. & S. 826, distinguished. *Ontario Electric Light and Power Co. v. Baxter and Galloway Co.*, 419.

See SPECIFIC PERFORMANCE.

CONVICTION.

See CRIMINAL LAW.

COPYRIGHT.

1. *Foreign Reprints—Notice to English Commissioners of Customs—Entry at Stationers' Hall—Copyright in Encyclopædia—Primâ facie Evidence of Copyright—Imperial Acts in Force in Canada.*—*Held*, that sec. 152 of the Imperial Customs Law Consolidation Act, 1876, 39 & 40 Vict. ch. 36, requiring notice to be given to Commissioners of Customs of copyright and of the date of its expiration, is not in force in this country, notwithstanding the expression of opinion in Part IV. of the Appendix to Volume 3 of the Revised Statutes of Ontario, 1897, to the contrary effect; and that the plaintiffs had established their right to an injunction perpetually restraining the defendants, the Imperial Book Company, Limited, from importing into Canada any copies of the 9th edition of the Encyclopædia Britannica, and for delivery up

thereof for cancellation, and for an account.

Semble, if in such notice to the Commissioners a wrong date is given as that of the expiry of the copyright, this will invalidate the notice.

Held, also, that a certified copy of the entry at Stationers' Hall is *primâ facie* evidence of proprietorship of copyright of an Encyclopædia under secs. 18 and 19 of the Imperial Copyright Act, 1842, and it is not necessary for such *primâ facie* case to prove the facts which by those two sections are made conditions precedent to the vesting of the copyright in one who is not the author.

The plaintiffs, by agreement in writing, in consideration of a large sum of money, gave certain other persons the exclusive right to print and sell the edition of the work in question at not less than certain fixed prices, for the remainder of the duration of their copyright except the last four years thereof, and delivered over to them the plates used in printing, which with all unsold copies were to be re-delivered on the expiry of the agreement, and agreed not to announce the publication of another edition before such last mentioned period, but expressly reserved the copyright to themselves:—

Held, that the agreement was a license and not an assignment, and so did not require registration under sec. 19 of 5 & 6 Vict. ch. 45 (Imp.) *Black v. Imperial Book Co.*, 184.

2. *Infringement—Newspaper*—“*First Publication.*”]—A newspaper printed and issued at a place in the United States, copies of which are deposited in the post office there addressed to subscribers both in that country and England, cannot be considered to be first published, or even simultaneously published, in England, so as to come within the provisions of the Imperial Act 5 & 6 Vict. ch. 45 requiring first publication in the United Kingdom to entitle the publishers to British copyright. *Grossman v. Canada Cycle Co.*, 55.

COSTS.

1. *Action to Recover—Foreign Law—Quebec Code of Civil Procedure—“Distraction”—Attorney’s Right to Recover without Intervention of Client.*]—“Distraction of costs,” as provided for in sec. 553 of the Code of Civil Procedure in the Province of Quebec, is the diverting of costs from the client or party who in the ordinary course would be entitled to them and their ascription to his attorney or other person equitably entitled.

Plaintiffs were the attorneys on the record for one R., against whom an action was brought in the Province of Quebec by the defendant, and an interlocutory motion therein had been dismissed with costs, taxed at \$238.20, and judgment entered therefor in the Superior Court

at Montreal. The defendant had recovered a judgment against R. in this Province and sought to set it off *pro tanto* against the judgment for costs:—

Held, that the plaintiffs were entitled to recover such costs from the defendant in their own names in Ontario without the intervention of their client. *Hutchinson v. McCurry*, 261.

2. *Scale of Costs—Amount Claimed Reduced by Trial Judge—Set-off.*]—In an action in the High Court for \$340, the balance of a \$970 account for logs, \$450 of which was paid before action, the trial Judge found that the sale was made as contended by the plaintiff, but reduced the amount by \$20 for some logs not received by defendant:—

Held, that the plaintiff was only entitled to county court costs, and the defendant was entitled to a set-off. *Brown v. Hose* (1890), 14 P.R. 3, distinguished. *Lovell v. Phillips*, 235.

3. *Scale of Costs—Trespass to Land—High Court Action—Payment of \$1 into Court—Acceptance—Con. Rule 425.*]—In an action for trespass to land valued at over \$200, in which the plaintiff claimed \$2,000 damages, no question of title to land being raised, the defendant paid \$1 into Court and the plaintiff accepted it:—

Held, that the plaintiff was entitled to his costs on the High Court scale. *Babcock v. Stan-*

dish (1900), 19 P.R. 195, followed. *McKelvey v. Chilman*, 263.

4. *Security for Costs—Præcipe Order—Increase in Amount—Rule 1208—Discretion.*—Under Rule 1208, the fact of the defendant having obtained a præcipe order for security for costs by which a definite amount of security is provided for, will not prevent him from maintaining an application for additional security when it becomes apparent that the costs to be incurred will be greatly in excess of the amount provided for, and there is no element of vexation on the part of the applicant.

Bell v. Landon (1881), 9 P.R. 100, distinguished.

Where the defendants had before the trial incurred large costs by reason of examinations for discovery, interlocutory motions and appeals, and a commission to take evidence abroad, the original security, \$200 paid into Court in compliance with a præcipe order, was ordered by a Judge (on appeal from a Master's order refusing an increase) to be increased by a bond for \$600 or payment into Court of an additional sum of \$300; and the order was affirmed by a Divisional Court as a reasonable exercise of discretion.

Decision of MACMAHON, J., affirmed. *Standard Trading Co. v. Seybold*, 8.

5. *Security for Costs—Præcipe Order—Waiver.*—Where it is stated in the writ of sum-

mons that the plaintiff resides out of the jurisdiction, the defendant may, even after delivering his defence and before issue is joined, obtain the usual præcipe order for security for costs. *Smerling v. Kennedy*, 430.

6. *Security for Costs—Residence Out of Ontario—Con. Rule 1198 (b).*—A man about thirty-six years of age, who had since childhood lived in the United States, came to Toronto in October, 1902, to inspect for his employers, brokers in New York, a branch office in Toronto. He was then instructed by his employers to act as telegraph operator in the Toronto office. These brokers gave up business in a few weeks, and he was then employed as a telegraph operator by their successors. The business of the successors also came to an end within a few weeks, and in connection with the business the plaintiff was accused by the defendant of fraud and arrested, this action for damages being brought in consequence thereof. He was an unmarried man and had been in the habit of living with his mother in Kansas City when out of employment, and he stated on cross-examination that he would return to the United States if he could find employment there:—

Held, that under these circumstances the defendant was entitled to security for costs of the action. *Kavanaugh v. Cassidy*, 614.

7. *Third Party—Rule 214—Discretion—Appeal.*]—Rule 214 gives power to the Court or a Judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the defendant. Such an order is in the discretion of the Court or Judge, and there is no appeal from it, unless by leave, as provided by the Judicature Act, R.S.O. 1897, ch. 51, sec. 72.

Tomlinson v. Northern R. W. Co. (1886), 11 P.R. 419, 526, is not applicable since Rule 214. *Russell v. Eddy*, 379.

See APPEAL, 1, 2—LIEN, 2—LUNATIC—MORTGAGE—MUNICIPAL CORPORATIONS, 1, 2, 5—PLEADING, 1—REVENUE, 1—SOLICITOR—WATER AND WATER-COURSES.

COUNSEL.

See PRACTICE, 1.

COUNTERCLAIM.

See PLEADING, 2.

COUNTY COURT JUDGE.

See CRIMINAL LAW, 2—INTOXICATING LIQUORS.

COUNTY COURTS.

See APPEAL, 3.

COURT OF APPEAL.

See APPEAL, 1, 2.

COVENANT.

Restraint of Trade—Severable Covenant—Waiver—Assignability.]—Defendant covenanted with the plaintiff that he would not “directly or indirectly engage in the drug business” in a certain village “or within a radius of ten miles therefrom during a term of five years from this date” . . . and that he would not “open or have part in a third or further drug store in” (said village) “during a term of ten years from this date.” The plaintiff sold his share in the business to the defendant and actively promoted a partnership between him and his (plaintiff’s) son, which was continued for some months, when the defendant sold out to the son. The plaintiff afterwards acquired the business and sold it by bill of sale, reciting the covenant, and extended its benefit to the purchaser and covenanted with him to save him harmless from a breach of the covenant by the defendant:—

Held, that for the first five years there were two concurrent severable covenants, and that, while the plaintiff might by his conduct have waived a breach of the first not to enter into business during the five years, he had not waived any breach of the second not to open or have part in a third drug store.

Held, also, that the covenant was assignable, and that the right to enforce it did not terminate by reason of the plaintiff having gone out of business. *Berry v. Days*, 629.

CRIMINAL LAW.

1. *Advertising Medicine Intended to Prevent Conception—Evidence to Support Conviction—Functions of Judge and Jury—Acquittal—New Trial—Crown Case Reserved—Appeal.*]—The defendant was tried upon an indictment for that he did unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise, and have for sale, a certain medicine, drug, or article, described, intended, or represented as a means of preventing conception, or causing abortion or miscarriage, contrary to the Criminal Code, sec. 179 (c).

The evidence for the Crown shewed that the defendant conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the defendant and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across

which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets; and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved. In the "directions" there was this statement: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets."

The Judge at the trial directed an acquittal, reserving a case for the Crown upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned:—

Held, that the jury could have legitimately inferred from the language used that the tablets were thereby represented as a means of preventing conception; and therefore it would have been right to have left the case to the jury; and a conviction might have been supported.

It is for the Judge to determine whether a document is capable of bearing the meaning assigned to it, and for the jury to say whether, under the circumstances, it has that meaning or not.

The Court declined to direct a new trial.

Per OSLER, J.A.:—Where there has been an acquittal, the trial Judge should leave the prosecutor to apply for leave to

appeal, rather than reserve a case. *Rex v. Karn*, 704.

2. *Conviction under Ontario Liquor Act, 1902—Removal of Proceedings by Certiorari—Subsequent Issue of Commitment—Invalidity—Amendment—Application of Statute Relating to Justices of the Peace—Irregularities—Name of Informant—Name of Defendant—Sentence—Adjudication—Fine.*—The defendant was convicted on the 3rd February, 1903, before a Judge designated under sec. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and to pay a penalty of \$400. On the same day a warrant was issued by the Judge, committing the defendant to gaol in pursuance of the conviction, and under this warrant he was arrested and lodged in gaol. On the 30th January, 1903, a writ of certiorari was issued to the Judge and a county Crown attorney, commanding them to send to the High Court of Justice all summonses, proceedings, etc., had before the Judge against the defendant and two others. This was served on the Judge on the 2nd February, before the date of the conviction and before the issue of the warrant:—

Held, that the proceedings against the defendant were removed from the court below by the issue and service of the certiorari, and that the subse-

quent proceedings were void.

By 2 Edw. VII. ch. 12, sec. 15 (O.), the provisions of the Criminal Code respecting amendment of proceedings before justices of the peace are made applicable to all cases of prosecutions under Provincial Acts:—

Held, not to apply to proceedings under the Liquor Act, 1902.

Semble, that in a conviction of this kind it was no objection on habeas corpus that the name of the informant did not appear, nor that the prisoner was prosecuted under the name of "Foster," whereas his name was "Forster."

Semble, also, that there was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings; but, at all events, there was no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. *Rex v. Foster*, 624.

3. *Crown Case Reversed—Application for—Grounds—Misapprehension of Jurors—Statements by.*—It is no ground for stating a reserved case, after a trial and conviction, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; it is contrary to principle to allow the statements of jurors, even under oath, to be used for the purpose of an

application for a reserved case.
Rex v. Mullen, 373.

4. *Importing Aliens under Contract to Labour—Conviction—Scienter—Irrregularity—Amendment.*—Conviction of defendant under 60 & 61 Vict. ch. 11 (D.), as amended by 1 Edw. VII. ch. 13 (D.), for unlawfully causing the importation of an alien from the United States into Canada under contract to perform labour in Canada by working in a factory, quashed as bad on its face, because not stating that he “knowingly” did the act charged, which indeed neither did the information allege.

Held, also, that this omission from the information and conviction was not a mere irregularity or informality or insufficiency within the meaning of sec. 889 of the Criminal Code, 55 & 56 Vict. ch. 29 (D.)
Rex v. Hayes, 198.

5. *Master and Servant Act—Information—Amendment—Trial without Objection—Fine—Commitment—Form of Conviction—Distress.*—The defendant was charged before a magistrate with having left his employment before the cost of his transportation to his work, which had been advanced to him, had been repaid by him, contrary to the Master and Servant Act, R.S.O. 1897, ch. 157, as amended by 1 Edw. VII. ch. 12 (O.)

The magistrate issued a warrant, with the facts stated in

the information substantially set out, adding these words, “consequently obtaining money under false pretences,” and subsequently amended the information by adding “as per sec. 14 (5a), Master and Servants Act, Ontario Statutes 1901;” but the information as amended was not resworn. The amended information was read over to the defendant, who was informed that he was to be tried under it as amended, to which he made no objection.

The defendant was formally convicted and fined and ordered to be imprisoned in default of payment of the fine and costs.

On a motion to quash the conviction:—

Held, that the nature of the offence intended to be charged was sufficiently clear in the original information; and any doubt was removed by the addition to it of the reference to the Act.

Held, also, that the information having been read over and the trial proceeded with without objection by the defendant, and the magistrate having the defendant before him, even if brought there improperly, might try him on the amended information not resworn.

Held, also, that the Court being satisfied that an offence of the nature described in the conviction had been committed, and that the magistrate had jurisdiction, and that the punishment imposed was not excessive, the conviction was not invalid and could be amended,

although the date and place of offence were not stated.

Held, also, that the costs of conveying the accused to gaol being omitted was a matter which could be amended if necessary; but here, there were no such costs, as the prisoner never went to gaol.

Held, also, that there was special power under the section under which the prisoner was convicted, to award imprisonment in default of payment; and that by R.S.O. 1897, ch. 90, sec. 4, that power covered costs as well as the fine. *Rex v. Lewis*, 509.

6. *Theft—Offender Over 17 Years of Age—Commitment for Two Years to the Reformatory—Transfer to Central Prison on Two Years' Sentence—Petty Offence—Six Months' Sentence—Criminal Code, secs. 752, 783, 785, 787, 955—R.S.C. 1886, ch. 183, secs. 19, 25.*—The defendant, a youth of over 17 years of age, was charged before a magistrate with stealing eighty cents out of the contribution box of a church. The magistrate's return shewed that the defendant pleaded guilty and was committed for two years to the provincial reformatory. He was taken to the reformatory and sent on to the central prison and kept there in custody under the warrant of commitment to the reformatory.

On a motion for his discharge on the return of a *habeas corpus*:—

Held, that there had been a miscarriage of legal directions in sending a lad of over 17 years of age to the reformatory and in sending him on a sentence of two years to the central prison.

Held, also, that sec. 785 of the Code is intended to comprehend summary trial "in certain other cases" than those enumerated in sec. 783, and that when the offence is charged and in reality falls under sec. 783 (a) it is to be treated as a comparatively petty offence with the extreme limit of incarceration fixed at six months under sec. 787.

Held, also, that under the circumstances this was not a case for further detention or the direction of further proceedings under sec. 752, and an order for the defendant's discharge was granted. *Rex v. Hayward*, 65.

See INTOXICATING LIQUORS.

CROWN CASE RESERVED.

See CRIMINAL LAW, 1, 3.

DAM.

See WATER AND WATERCOURSES.

DAMAGES.

Death by Accident—R.S.O. 1897, ch. 166—Apportionment between Widow and Children.—An action brought against a railway company by a widow on behalf of herself and four

infant children, aged respectively seven, five, three, and one year, to recover damages for the death of her husband through the company's negligence, was settled by the company paying \$4,800. On application to a Judge the amount was apportioned by giving the widow \$1,200 and each of the children \$900, the widow also to be paid for the children's maintenance, \$200 a year for three years, the fact of the widow having already received \$1,000 for insurance on the husband's life, being taken into consideration in apportioning her share. *Burkholder v. Grand Trunk R.W. Co.*, 428.

See CONTRACT, 1—DEFAMATION, 4—PENALTIES AND PENAL ACTIONS, 1—WASTE.

DEFAMATION.

1. *Libel—Pleading Setting out Whole Article—Immaterial Issue—Embarrassing—Striking out.*]—The very words complained of in an action of defamation must be set out by the plaintiff, in order that the Court may judge whether they constitute a cause of action—it is not sufficient to give the substance or purport with innuendo—it is sufficient to set out the libellous passages, provided that nothing be omitted which qualifies or alters the sense; and, as the libel itself must be produced at the trial, and the defendant is entitled to have the whole of it read:—

Held, that the plaintiff was entitled in this action to set out in the statement of claim the whole article complained of. But

Held, also, that certain words in another paragraph which tendered an issue not material but which might be embarrassing should be struck out. *Deyo v. Brundage* (1856), 13 How. Pr. 221, specially referred to. *Hay v. Bingham*, 224.

2. *Libel—Privilege—Publication—Stenographer.*]—The fact that the manager of a company had in the ordinary course of the correspondence of the company handed to his stenographer, to be typewritten by him, a draft letter containing defamatory statements, but of a privileged nature, does not amount to such publication as takes away the privilege. *Puterbaugh v. Gold Medal Co.*, 680.

3. *Libel—Words of Abuse—Natural Signification—Innuendo.*]—The defendant, a tax collector, having applied to the plaintiff for payment of certain taxes, was told by him that J.S. should pay them. He subsequently wrote and mailed to the plaintiff a post card stating "I saw J.S. this morning, he said make the S.B. pay it."

In an action for libel, in which plaintiff claimed that "S.B." applied to him and meant "son of a bitch:—"

Held, that there was no reasonable evidence to go to the jury that the letters conveyed the meaning attributed to them

by the plaintiff; they were words of abuse which, as often used, were absolutely meaningless and did not impute anything against the character of the plaintiff's mother and were not a statement as a fact of something obviously untrue; that in their natural signification they were not objectionable; and that the plaintiff had failed to prove his innuendo. *Major v. McGregor*, 81.

4. *Special Damage* — *What Constitutes.*]—The special damage required in an action of defamation must be such as would be the reasonable and natural result of the words used.

Where, therefore, the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece from her father's estate, had put in a fictitious account for trifling matters, such as for candies, oranges, etc., and obtained payment of it, the special damage alleged being that in consequence the niece and his wife had left him and refused to live with him:—

Held, that such damage was not recognizable at law, not being the natural and reasonable consequence of the words used. *Ludlow v. Batson*, 309.

DEVOLUTION OF ESTATES ACT.

See ATTACHMENT OF DEBTS, 2.

DIRECTORS.

See COMPANY, 1, 3, 4.

DISCOVERY.

See EVIDENCE.

DISTRESS.

See CRIMINAL LAW, 5.

DIVISION COURTS.

Prohibition — Garnishment of Married Man's Wages—Exemption—Evidence of Marriage—Repute.]—In a division court action the Judge held that evidence of repute was not sufficient to prove that a primary debtor was a married man and so entitled to the \$25 exemption provided for by R.S.O. 1897, ch. 60, secs. 180 and 181:—

Held, that he had not decided upon a state of conflicting facts, but upon a theory that the best evidence must be given, which was a wrong assumption in point of law; and prohibition was granted. *Elston v. Rose* (1868), L.R. 4 Q. B. 4, followed. *Re Rochon v. Wellington*, 102.

See ATTACHMENT OF DEBTS, 1—BILLS OF EXCHANGE.

DIVISIONAL COURT.

See APPEAL, 3.

DONATIO MORTIS CAUSA.

See GIFT—REVENUE, 2.

DOWER.

Equitable Estate—Voluntary Conveyance by Husband.]—It is only when the husband dies beneficially entitled thereto that the wife acquires any right to dower in an equitable estate, and the husband can, therefore, deal as he pleases with such an estate, a voluntary conveyance thereof, even though made with an object of preventing the wife acquiring any right to dower, being unimpeachable by her.

Judgment of Falconbridge, C.J.K.B., affirmed. *Fitzgerald v. Fitzgerald*, 279.

DRAINAGE REFEREE.

See PRACTICE, 2.

ELECTION.

See INSURANCE, 2.

ELECTIONS.

See MUNICIPAL CORPORATION, 3-7 — PARLIAMENTARY ELECTIONS.

EQUITABLE EXECUTION.

See EVIDENCE, 1.

ESTOPPEL.

See REVENUE, 2—SCHOOLS.

EVIDENCE.

1. *Discovery—Examination for—Action for Equitable Execution—Right to Attack Judgment—Absence of Fraud and Collusion.*]—In an action brought by a judgment creditor against the judgment debtors and one L. for the recovery, by way of equitable execution, of moneys alleged to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances under which the judgment was recovered, cannot, in the absence of fraud and collusion in the recovery thereof, be insisted upon.

A motion that one of the plaintiffs, who, on examination for discovery, had refused to answer questions relating to such circumstances, should be compelled to attend and be examined at his own expense, was therefore refused. *Smith v. McDermott*, 515.

2. *Discovery—Examination for—Attendance before Special Examiner—Duty to Remain until Examined.*]—A party to an action subpoenaed for examination for discovery before a special examiner and who has been paid his conduct money for the day may be “compelled to attend and testify in the same manner . . . as a witness.”

One of four defendants, all of whom were subpoenaed for half past ten in the morning and attended, after being excluded from the examiner's chambers,

waited while the others were being separately examined until after two in the afternoon, when, without communicating with the examiner, he went away and did not attend for examination:—

Held, that he was rightly ordered to attend again for examination. *Campbell v. Scott*, 233.

3. *Discovery — Examination for — Officer of Company — Engine Driver — Con. Rule 439.*—On application for leave to examine an engine driver for discovery, under Con. Rule 439, as an officer of the defendants, in an action under R.S.O. 1897, ch. 166, the Fatal Accidents Act:—

Held, reversing the decision reported 4 O.L.R. 43, that, inasmuch as the engine driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control of the train, so as to make him responsible to the defendants, except for the management of his engine, he was not an officer of the company examinable under that Rule. *Morrison v. Grand Trunk R.W. Co.*, 38.

4. *Discovery — Examination for — Postponement until Prior Questions Disposed of — Fiduciary Relationship — Account — Con. Rule 472.*—The statement of claim contained a single cause of action based upon the proposition that the individual defendants, under the circumstances of the transactions de-

tailed in it, stood in a fiduciary relation to the defendant company, which prevented them from making any profit out of their purchase of certain businesses afterwards transferred by them for a large sum to the company, and claimed an account, and payment by them of the difference between the aggregate of the price paid by them and what was paid to them. It was admitted that the individual defendants had made a large profit on the sale to the company, and the only matter really in controversy was the fiduciary relationship with the company, and their liability to account for such profit, and if liability existed, the amount for which they were answerable:—

Held, reversing the decision of BRITTON, J., that discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account had been established. *Bedell v. Ryckman*, 670.

See BILLS OF EXCHANGE — EXECUTORS AND ADMINISTRATORS — RAILWAY, 4.

EXAMINATION OF PARTIES.

See EVIDENCE.

EXECUTION.

See HUSBAND AND WIFE.

EXECUTORS AND ADMINISTRATORS.

Evidence — Matters Occurring before Death of Deceased—Corroboration—R.S.O. 1897, ch. 73, sec. 10—Devise to Executor—Whether in Lieu of Compensation — Negligent Management.—The executor of the estate of H. was also the executor of the estate of M., in which H. was beneficially interested. In passing his accounts as executor of another estate after H.'s death, the executor credited himself with having received for H. on account of her share in such last named estate a specified sum of money. On subsequently proving his accounts in the H. estate, and being charged with this sum, as having been received by him for the deceased, he claimed that he had not then received it, but had in fact paid it out in small sums to H. during her lifetime :—

Held, that this was not a matter occurring before the death of H., and therefore the evidence of the executor did not require to be corroborated under sec. 10 of the Evidence Act, R.S.O. 1897, ch. 73.

A testatrix by her will devised to her brother, naming him as such, certain lands free from incumbrances, with a direction for the payment out of her general personal estate of any incumbrance thereon, and she appointed him her executor, and provided for the appointment of a successor in such

office, in case of a vacancy, without in such an event diverting the benefit from him :—

Held, that the devise was not given to him in his capacity as executor, but in his personal capacity, and did not preclude him from claiming compensation for his services to the estate.

Compton v. Bloxham (1845), 2 Coll. 201, distinguished.

The fact of an executor being guilty of acts of negligence, mismanagement, and breach of trust in his management of the estate, there being nothing of a dishonest or fraudulent character, while the losses resulting therefrom were capable of being compensated for and made good in money, does not deprive him of his right to compensation.

Hoover v. Wilson (1897), 24 A.R. 424, referred to. *McClenaghan v. Perkins*, 129.

See ATTACHMENT OF DEBTS, 2
—LIMITATION OF ACTIONS, 1.

FATAL ACCIDENTS ACT.

See DAMAGES — EVIDENCE, 3
—MASTER AND SERVANT.

FENCES.

See RAILWAY, 5, 6.

FERRIES.

See CONSTITUTIONAL LAW, 1.

FOREIGN LAW

See COSTS, 1.

FORFEITURE.

See PENALTIES AND PENAL ACTIONS, 1.

FRANCHISE.

See COMPANY, 2.

FRAUD.

See BANKS AND BANKING—BILLS OF EXCHANGE—EVIDENCE, 1—LIMITATION OF ACTIONS, 1.

GAS COMPANY.

See COMPANY, 2, 3.

GIFT.

Donatio Mortis Causâ—Solicitor and Client—Absence of Independent Advice—Invalidity of Gift.]—Held, per Moss, C.J.O., and GARROW, J.A., that where at the time of the making of an alleged *donatio mortis causâ*, the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to any one, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the deceased, such

gift could not be supported; MACLENNAN, J.A., dissenting.

Per OSLER, J.A.:—Apart from the question of confidential relationship, the plaintiff's testimony as a litigant making a claim upon the estate of a deceased person in respect of a matter occurring before the death of such person had not been corroborated by some other material evidence, as required by sec. 10 of the Evidence Act, R. S.O. 1897, ch. 73.

Judgment of Falconbridge, C. J.K.B., affirmed. *Davis v. Walker*, 173.

See HUSBAND AND WIFE—REVENUE, 2.

HARBOUR

See CONSTITUTIONAL LAW, 1.

HUSBAND AND WIFE.

Gift from Husband to Wife—Possession—Execution Creditor—Married Woman's Property Act—R.S.O. 1897, ch. 163, sec. 3.]—The defendant purchased certain pictures between 1895 and 1898, and bringing them home handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother, and all were hung up in the house occupied by her and her husband. An execution creditor of the defendant caused the sheriff to levy on them:—

Held, that since the Married Women's Property Act, 1884 (R.S.O. 1897, ch. 163, sec. 3), a

married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband; and that here the subsequent possession of the pictures was the wife's, although the house was occupied by her husband and herself.

Held, also, that the effect of sub-sec. 4 of sec. 5 of R.S.O. 1897, ch. 163, enacting that a woman married since 1889 may hold her property free from the debts or control of her husband, "but this sub-section shall not extend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from the husband during marriage liable to the husband's debts. *Shuttleworth v. McGillivray*, 536.

See DOWER.

IMPROVEMENTS.

See WILL, 3.

INFANT.

See NEGLIGENCE—PARTITION.

INJUNCTION.

See MUNICIPAL CORPORATIONS,
9—WATER AND WATERCOURSES.

INSURANCE.

1. *Life Insurance—Application—Materiality of Answers—Evidence—Onus—Bona Fides.*]—A defence to an action on a policy of life insurance was that the insured in his application, made in 1891, stated he was forty-one, whereas in fact he was forty-four:—

Held, that evidence of statements made by the insured many years before the application tending to shew his belief that he was born in 1850, for the purpose of shewing *bona fides*, was improperly rejected.

The jury found that the statement in the application that the insured was born in 1850 was untrue and was material, and, although there was no evidence to that effect, that it was made in good faith:—

Held, that on these answers judgment should have been entered for the defendants, the onus being on the persons seeking to uphold the contract to prove the *bona fides* of the answers.

New trial ordered to permit plaintiff to adduce evidence of good faith, which had been rejected. *Dillon v. Mutual Reserve Fund Life Association*, 434.

2. *Life Insurance—Benevolent Society—Certificate—"Legal Heirs Designated by Will"—Election.*]—A certificate issued by a benevolent society to a married woman on the 25th October, 1892, provided that the benefit was to be payable to her

"legal heirs as designated by her will." She died on the 14th November, 1892, leaving her husband and her three children her surviving. By her will, dated the 30th September, 1892, she gave specific properties and legacies to her husband and each of her three children by name, the insurance to her executors "for the purpose of paying there-out all debts due by me," and the residue to her children:—

Held, that the bequest of the insurance money to the executors was inoperative; that it was payable to the three children as "legal heirs designated by will," and that the children were not bound to elect between the benefits specifically given to them and the insurance money. *Griffith v. Howes*, 439.

3. *Life Insurance—Condition in Policy—Arbitration before Action.*—In an action on a policy, on which was indorsed a condition that in case any question should arise "it is a condition of this policy, which the insured by the acceptance thereof agrees to abide by, .

. . . every such difference shall be referred to the arbitration and decision of a neutral person, . . . and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable, . . . and it is hereby expressly stipulated and declared, that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or

obligation of the corporation to pay or satisfy any claim under this policy," etc. "Provided also, that compliance with the stipulations indorsed hereon is a condition precedent to the right to recover on this policy."—

Held, that an action did not lie on the policy, nor did the amount payable under it become due, until the determination of the arbitrator, to be appointed under the agreement to refer, contained in the condition.

Held, also, that the condition was not in contravention of sec. 80 of the Ontario Insurance Act, R.S.O. 1897, ch. 203.

Spurrier v. LaCloche, [1902] A.C. 446, followed. *Nolan v. Ocean Accident and Guarantee Corporation*, 544

See BANKS AND BANKING—RAILWAY, 1.

INTEREST.

See CONSTITUTIONAL LAW, 2
—LANDLORD AND TENANT, 3, 4
—WILL, 8.

INTOXICATING LIQUORS.

Ontario Liquor Act, 1902—Referendum—Power of Legislation—Trial of Offenders—Constitution of Court—County Judge—Special Court—Issue of Summons—Adjournment for Sentence.—On a motion to quash a conviction for attempting to put a paper other than

the ballot paper authorized by law into a ballot box while the question referred to the electors by the 2nd section of the Liquor Act, 1902, was being voted upon throughout the Province, contrary to the provisions of sec. 91 of the Ontario Election Act, R.S.O. 1897, ch. 9, and sec. 91 of the Liquor Act, 1902 :—

Held, that the reference by the Legislature of such a question as that mentioned in sec. 2 of the Liquor Act, 1902, to the vote of the electors, instead of deciding it themselves, although unusual, was well within their powers.

Held, also, that the intention of the Legislature, under subsec. 4 of sec. 91, was to create a tribunal with authority to try certain specified offences, and that the Court so created had power, under the words "to conduct the trial," to bring the party charged before the Court, try him for the offence, and sentence him, if found guilty; and that the county Judge appointed to conduct the trial does not act as a county Judge, but as a Court specially created, and should act out of his own county in holding the actual trial; and that he may issue his summons in his own county or elsewhere; and has power after finding the accused guilty to adjourn the Court to a subsequent day for the purpose of passing sentence. *Rex v. Walsh*, 527.

See CRIMINAL LAW, 2.

JUDGMENT.

Default Judgment — *Statement of Defence*.]—An order made in an action in a county court for service of notice of a writ out of the jurisdiction, provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." Within the twelve days an appearance in the usual form was entered, the following words being added: "The defendant admits only \$103 but otherwise disputes plaintiff's claim in this action."—

Held, that this was in effect a statement of defence; that filing was, under the order, all that was necessary, and that a judgment entered for default of defence was void. *Voight Brewery Co. v. Orth*, 443.

See EVIDENCE, 1—PRACTICE, 1
SOLICITOR, 2—WILL, 8.

JURY.

See CRIMINAL LAW, 3—RAILWAY, 5—STREET RAILWAYS.

JURY NOTICE.

See PLEADING, 3.

LACHES.

See LANDLORD AND TENANT, 1.

LANDLORD AND TENANT.

1. *Lease—Renewal of—Right to Demand—Laches—Appointment of Arbitrators—Injunction to Restrain Proceedings Before Sole Arbitrator—Jurisdiction.*]

—The renewal clause in a lease provided that at the expiration of the term the lessors might at their election either take the lessees' improvements at a valuation to be fixed by arbitrators prior to such election being made, or grant a new lease for a further term. No time limit was fixed within which the arbitration should take place, and either party might require the other to appoint an arbitrator within seven days, and on default might appoint a sole arbitrator. The lease terminated on the 1st November, 1900, and on the 30th April, 1900, the lessees wrote saying they had no desire to renew and would be glad to give up possession. The lessors, however, did nothing to relieve the lessees of possession; but, on the contrary, in June and July, 1901, they endeavoured unsuccessfully to have the assessment roll altered by preserving the tenants' names thereon as still tenants. On the 15th February, 1902, they gave notice to arbitrate, requiring the lessees to appoint an arbitrator:—

Held, that the lessees were not precluded by delay from enforcing renewal of the lease.

The lessees, disputing their obligation to take a renewal lease, and desiring to have that point first decided, appointed

their arbitrator under protest, but the lessors refused to accept such nomination, and appointed a sole arbitrator:—

Held, that the Court had jurisdiction to restrain proceeding before a sole arbitrator, and injunction granted accordingly. *Farley v. Sanson*, 105.

2. *Lease—Short Forms Act—Covenant not to Assign—Breach—Right of Re-entry.*]

—The right of re-entry under the Act respecting Short Forms of Leases applies to the breach of a negative as well as of an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sublet without leave.

Toronto General Hospital v. Denham (1880), 31 C.P. 207, followed.

The making of an agreement for the assignment of a lease, the settlement of the terms thereof, and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant; the fact of the document shewing the transfer not having been made until after action brought, is immaterial. *McMahon v. Coyle*, 618.

3. *Railway Company—City Lease—Usual Covenants—Covenants to Pay Taxes and Repair—Right of Re-entry—Rent in Arrear—Interest.*]

—An agreement made between the city of Toronto and the Canadian Pacific Railway Company, provided, amongst other things, for a lease

renewable in perpetuity, by successive terms of fifty years, at an agreed rent, payable on named days, nothing being said about covenants:—

Held, that the agreement was not self-contained, but that the execution of a formal lease was contemplated, which should contain the usual covenants, and that covenants to pay taxes, and for the right of re-entry for non-payment of rent or taxes, were, under the circumstances here, usual covenants.

Where by the agreement, a time was fixed for the commencement of the lease, and the railway company entered into possession, and had the enjoyment of the demised premises, but the title was not settled until some time afterwards, interest on arrears of rent, which accrued due in the meantime, was allowed.

Judgment of *BOYD, C.*, 4 O.L.R. 134, reversed in part. *In re Canadian Pacific R. W. Co. and City of Toronto*, 717.

4. *Valuation of Buildings—Extension of Time for Making Award—Interest.*]—By a lease made on the 1st November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuers or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st November, 1900; and it was further

agreed that within six months from that day the value of the buildings found by the arbitrators should be paid by the lessors, with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the valuers or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the lands and buildings was given up by the lessees to the lessors on the 31st October, 1900:—

Held, *OSLER, J.A.*, *dubitante*, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent., and for the remainder of the time at the legal rate of five per cent.

Judgment of a Divisional Court, 3 O.L.R. 519, varied. *Toronto General Trusts Corporation v. White*, 21.

See ATTACHMENT ON DEBTS, 2.

LEASE.

See LANDLORD AND TENANT—PARTITION.

LEGACIES.

See WILL.

LIBEL.

See DEFAMATION.

LIEN.

1. *Mechanics' Liens—Action—Practice—Affidavit Verifying Statement of Claim—Particulars of Residence of Plaintiffs.*]—In the case of an action under the Mechanics' Lien Act, R.S.O. 1897, ch. 153, the affidavit verifying the statement of claim, required by sec. 31 (2), may be made by the plaintiffs' solicitor as agent.

The plaintiffs were day labourers, who did work for the defendants on a railway in an unorganized district, and it was set forth in the statement of claim that they resided in that district; the name and address of the plaintiffs' solicitor were also stated therein:—

Held, that it was not necessary to give more precise particulars of the places of residence of the plaintiffs. *Crerar v. Canadian Pacific R. W. Co.*, 383.

2. *Mechanics' Liens—Costs—“Actual Disbursements”*—R.S.O. 1897, ch. 153, sec. 42.]—The “actual disbursements” which by sec. 42 of the Mechanics' Lien Act, R.S.O. 1897, ch. 153, may be allowed as against an unsuccessful claimant in addition to an amount equal to twenty-five per cent. of

the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and *à fortiori* not counsel fees charged by the solicitor himself when acting as counsel.

Judgment of FALCONBRIDGE, C.J., affirmed.

Cobban Manufacturing Co. v. Lake Simcoe Hotel Co., 447.

See SOLICITOR.

LIFE INSURANCE.

See INSURANCE.

LIMITATIONS OF ACTIONS.

1. *Claim Against Estate of Deceased Person—Corroboration—Special Agreement—Running Account—Terms of Credit—Demand—Fraud upon Creditors—Pleading.*]—The plaintiff claimed from the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1895. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on the 16th May, 1895. This action was begun on the 4th May, 1901.

The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible,

to get on without the money and to leave it in the hands of the deceased, who said he would save it for the plaintiff, and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go in to the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinct, was given by another witness:—

Held, that there was sufficient corroboration of the plaintiff's statement.

Held, also, that the plaintiff was not obliged to prove a definite term for which credit was given; the agreement was in effect one that the testator was to hold the money at least until the plaintiff demanded it; and, as there was no demand before the 16th May, 1895, the action was in time.

Held, also, that the agreement was not one which offended against the law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it. *Wilson v. Howe*, 323.

2. *Simple Contract Debt—Conversion into Specialty Debt*

—*Evidence of.*—Default having been made in the payment of two promissory notes payable to a bank, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed, after reciting the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, the father thereby conveyed the same to the trustee as security, in the first place for his indebtedness, and then for that of the bank, power being given to the trustee to sell the lands on one month's default in payment and on notice in writing by the trustee of his intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay same. In 1893, written notice having been given by the trustee of his intention to sell, a deed of release of all his interest in the lands were given by the defendant to the bank, the deed reciting that it was made to save expense of a sale:—

Held, that neither the trust deed, nor the deed of release converted the debt into a specialty debt, and the defendant could validly set up the Statute of Limitations as a bar to an action brought in 1902. *Bank of Montreal v. Lingham*, 519.

See ASSESSMENT AND TAXES—SOLICITOR, 2.

LIS PENDENS.

See SOLICITOR, 1.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 8.

LUNATIC.

Care of Lunatic's Estate—ommittee's Duty as to—Schemes for Maintenance—Taxation of Costs.—The rule has for many years been that when the Court intervenes in respect to the property of persons not *sui juris* the moneys shall not be left to private investment but shall be paid into Court and become subject to its general system of administration by which the interest will be punctually paid and the corpus will always be forthcoming when needed.

The general rule to be observed by local officers when it is advisable that the estate should be realized and turned into money, is, that the fund so realized shall be paid into Court; and when part of the estate is converted and part kept for the abode of a lunatic or otherwise, the scheme for dealing with the whole shall be reported to the Court, that proper directions may be given

In two cases where local Masters had reported schemes for the maintenance of lunatics and made provision for the moneys of the estates being collected by the respective committees and

thereafter for their investment by the committees on securities of different kinds at their discretion, and in one case had taxed the costs and inserted the amount in the report:—

Held, that it is imperative that the costs in lunacy matters be taxed by the proper officer in Toronto, as the local Master has no authority to tax them.

Held, also, that the moneys in the hands of the committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court. *Re Norris, Re Drope*, 99.

MAINTENANCE.

See LUNATIC.

MALICIOUS PROSECUTION.

Search Warrant—Summons—Amendment of Information—Belief of Theft—Belief of Ownership—Reasonable and Probable Cause.—In an action for malicious prosecution, in which the plaintiff was nonsuited, it appeared that a magistrate, upon the information of the defendant that the plaintiff unlawfully had and kept in his possession a dog belonging to the defendant, had issued a search warrant to a constable, who took the dog against plaintiff's protest. An information was then laid by the constable to the same effect and a summons issued against plaintiff, on the return of which, on plaintiff's counsel objecting that no

offence was shewn, the information was amended, and the plaintiff was charged with stealing the dog, which charge was dismissed:—

Held, that the matter having been fairly stated to the magistrate by defendant he was not liable for the erroneous view of the magistrate as to his jurisdiction in issuing the warrant and summons: but

Held, also, that there being evidence that the defendant had assented to the amendment, he was not justified in charging the plaintiff with theft, because he believed the dog was his own; the real question being, not whether the defendant believed the dog to be his, but whether he believed that the plaintiff had stolen him, and that the case should have been left to the jury.

Judgment of the county court of Middlesex reversed. *Pring v. Wyatt*, 505.

MANDAMUS.

See SCHOOLS.

MARRIAGE.

See DIVISION COURTS.

MARRIED WOMAN'S PROPERTY ACT.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

Death of Servant—Railway—Negligence—Signals—Interlocker—Contributory Negligence—Orders to Engine Drivers—Workmen's Compensation Act.]—The defendants were erecting an interlocking apparatus at a point of their main line where there was a siding, whereby the switch could be worked and a signal shewn to indicate how it was set, by lowering the upper or lower arm of the signal as the case might be. The plaintiff's husband, an experienced engine driver in defendants' employ, having been informed before starting with his train that the apparatus was in working order and that all trains were to be governed by the rules applicable in such cases, approaching the spot, saw the signal with both arms down, intimating that the interlocker was out of order, but nevertheless proceeded, and the switch not being fastened in any way the train was derailed and he was killed. As a matter of fact, the apparatus was not in working order, a switchman of the defendants being at the spot with flag signals to use in case of necessity, but he failed to warn the deceased. The defendants' rules governing engine drivers provided that they should stop when in doubt as to the meaning of a signal, also that a signal imperfectly displayed must be regarded as a danger signal, and that in case of doubt they were to take the safe course

and run no risk. Employees were also specially instructed that if an interlocker was out of order trains were to be flagged through.

The plaintiff brought this action for damages under R.S.O. 1897, ch. 166:—

Held, that, although there was a plain defect in the condition of the way which was the cause of the derailment of the engine, the plaintiff was properly nonsuited, in that her husband, had he survived, could not have maintained an action, having negligently disobeyed his orders as contained in the rules, by proceeding with his train in spite of the condition of the signals. *Holden v. Grand Trunk R.W. Co.*, 301.

See CRIMINAL LAW, 5.

MASTER IN ORDINARY.

See PRACTICE, 3.

MECHANICS' LIENS.

See LIEN.

MISTAKE.

See WILL, 8.

MORTGAGE.

Costs—Excessive Demand—Tender.] — Demanding much more than is afterwards found to have been due is not such misconduct on the part of a mortgagee as will deprive him

of his costs. To relieve the mortgagor from liability to costs he must make an unconditional tender of the amount actually due. *Daigneau v. Dagenais*, 265.

See BUILDING SOCIETY—CONSTITUTIONAL LAW, 2.

MUNICIPAL CORPORATIONS.

1. *Borrowing Powers*—"Ordinary Expenditure"—*School Purposes*—R.S.O. 1897, ch. 223, sec. 435 — *Costs.*] — The power conferred upon a municipality by the Municipal Act, R.S.O. 1897, ch. 223, sec. 435, of borrowing money to meet current expenditure is distinct from the power conferred by that section of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed eighty per cent. of the amount collected in the preceding municipal year for the current expenditure of the municipality apart from the expenditure for school purposes.

An outlay which is not contemplated when the estimates are prepared, and for which no provision either special or as a possible contingency is made in the estimates for the year, cannot be treated as part of the ordinary expenditure to meet which a loan may be effected.

Where the statutory limit had been exceeded, but before the action was tried, the money had been repaid, the plaintiff, who sued on behalf of himself and all other ratepayers, was held

entitled to have the merits of the case disposed of, and, in the result, his costs awarded to him, and this although the borrowing had taken place to enable the municipality to carry on prior litigation pending between the plaintiff and the municipality.

Judgment of ROBERTSON, J., reversed. *Holmes v. Town of Goderich*, 33.

2. *Costs — Municipal Act, R.S.O. 1897, ch. 223, sec. 470—Trespass — Compensation — Powers of Trial Judge.*—Section 470 of the Municipal Act, R.S.O. 1897, ch. 223, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality."

In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work:—

Held, that sec. 470 did not apply, as the plaintiff's claim was for trespass and not for negligence, and that the trial Judge had full power over costs.

Judgment of FERGUSON, J., affirmed. *Lawrence v. Town of Owen Sound*, 369.

3. *Election of Councillors—Disqualification — Membership in School Board "for which Rates are Levied" — Resignation between Nomination and Polling — Relator's Claim to Seat—Notice to Electors.*—By 2 Edw. VII. ch. 29, sec. 5 (O.), sec. 80 of the Municipal Act

R.S.O. 1897, ch. 223, is amended so as to provide that "no member of a school board for which rates are levied" shall be qualified to be a member of the council of any municipal corporation.

The respondent was a member of a school board for a section which had no school or teacher of its own; but the board was organized, and paid over the rates levied on the section to the board of an adjoining section, which provided accommodation for the school children living within the first-named section:—

Held, a school board for which rates are levied, within the meaning of the amendment.

Held, also, following *Regina ex rel. Rollo v. Beard* (1865), 3 P.R. 357, and *Regina ex rel. Adamson v. Boyd* (1868), 4 P.R. 204, that the respondent, being a member of a school board on the day of the nomination for the office of county councillor, was disqualified for the latter office, although he resigned his membership in the school board before the day of polling.

No objection to the respondent's qualification was taken until the day of polling, on which day notices were posted up in five out of the twelve polling booths warning the electors not to vote for the respondent:—

Held, not sufficient to entitle the relator to the seat. *Rex ex rel. Zimmermann v. Steele*, 565.

4. *Election of Councillors—Disqualification—Membership in School Board “for which Rates are Levied”—Objection before Election—Resignation before Taking Office—New Election.*—A relator in an application in the nature of a *quo warranto* is not entitled to the seat where he neither objects to the disqualification of the respondent at the nomination nor gives any notice on the election day to the electors that they were throwing away their votes.

Section 76 of the Municipal Act relating to the qualification of different members of local municipalities does not apply to county councillors.

The resignation by a school trustee after his election as county councillor and before taking his seat does not remove his disqualification arising from the fact that he was a member of a school board for which rates were levied.

Regina ex rel. Rollo v. Beard (1865), 3 P.R. 357, followed.

The words “for which rates are levied” used in 2 Edw. VII. ch. 29, sec. 5 (O.), disqualify any member of the council of any municipal corporation who was at the time of his election a member of a school board for which rates were levied, whether levied by the municipal corporation of which he was elected a member or by any other.

The saving clause in sec. 5 refers to the election of the member of the council of any municipal corporation and not to the election of a school trustee.

Rex ex rel. Zimmerman v. Steele, 5 O.L.R. 565, followed. *Rex ex rel. O'Donnell v. Broomfield*, 596.

5. *Election of Councillors—Disqualification—Membership in School Board “for which Rates are Levied”—Resignation—Non-acceptance—Designation of Board—Relator's Claim to Seat—Notice to Electors—Costs—Status of Relator—Discretion.*—Held, that the respondent, being a member of the school board for a union school section, a school board for which rates were levied, and his resignation as such not having been accepted by his co-trustees, was, by 2 Edw. VII. ch. 29, sec. 5 (O.), disqualified for the office of township councillor; and it was not material whether the school corporation of which he was a member was called a “board of public school trustees of union section,” etc., or a “public school board.”

The respondent's qualification not having been objected to at the nomination, so that the electors might have an opportunity of nominating another candidate, the defeated candidate was not entitled to the seat.

Rex ex rel. Steele v. Zimmerman, 5 O.L.R. 565, followed.

It appearing to be the fact, but there being no actual proof, that the relator was put forward by the clerk of the township, and the relator having put the respondent to expense by his unsuccessful claim to have the defeated candidate seated, while

the election was set aside and a new election ordered, no costs were given to either party. *Rex ex rel. Robinson v. McCarty*, 638.

6. *Election of Councillors—Irregularity—Quo Warranto Application—Status of Relator—Voting for Respondent—Disclaimer.*—The relator attacked the election of the respondents as county councillors for non-compliance with certain statutory formalities:—

Held, that the relator, by voting for M., one of the respondents, who was in the same class with the others, acquiesced in and became a party to the irregularity, and could not be heard to complain. The fact that M., after service of the notice of motion, disclaimed office, was *nihil ad rem*. *Rex ex rel. McLeod v. Bathurst*, 573.

7. *Election of Councillors—Time of Holding Nomination.*—Notwithstanding the Municipal Amendment Act, 1898, the nomination of candidates for the office of councillor, in towns having a population of not more than five thousand persons, and where the election is to be by general vote, may take place at the same time and place as the nomination for mayor, and therefore at ten o'clock in the forenoon.

Seemle, an error in this respect as to the time and place of the nomination would come within the curative provisions of sec. 204 of the Municipal Act, R.S.O.

1897, ch. 223, and would not be a fatal objection to the validity of the subsequent election.

Judgment of the Master in Chambers reversed. *Rex ex rel. Warr v. Walsh*, 268.

8. *Local Improvements—Reconstruction of Sidewalk—Payment for out of General Funds—Illegality—Liability of Councillors Sanctioning Payment—Trustees—Breach of Trust—Excuse—Relieving Statute.*—By a special Act of the Legislature of Ontario incorporating a town it was provided that all expenditure in the municipality for improvements and services for which special provisions were made in secs. 612 and 624 of the Consolidated Municipal Act, 1883, should be by special assessment on the property benefitted and not exempt by law from taxation; and the construction of sidewalks upon the local improvement plan was one of the matters provided for by sec. 612.

In 1886 a board sidewalk was laid upon one of the streets of the town, in accordance with a by-law, and paid for by a special assessment upon the properties fronting upon it. A portion of the sidewalk so laid was not much used, and had never been repaired, and in 1902 was out of repair and dangerous. The remainder had been more used, had been repaired from time to time by the council at the general expense, and in 1902 was in a good state of repair. In that year the agent of the

owners of the property fronting on the part of the sidewalk that was out of repair threatened proceedings to compel the council to put it in repair, and, as there was pressing need that it should be put into a state in which it would not be dangerous to the public, the chairman of the board of works directed the corporation foreman to proceed at once to put it in a good state of repair, and this was done by taking up the old sidewalk altogether, laying down new stringers, using such of the boards of the old sidewalk as were good, and replacing those which were bad with new ones. This work was paid for out of the general funds of the town.

In an action by a ratepayer, on behalf of all ratepayers other than the defendants, against the members of the council who sanctioned the payment for this improvement, and against the corporation of the town, the claim was that the individual defendants might be ordered to pay to the corporation the moneys expended in the construction of the sidewalk, and that the defendants might be enjoined from paying any further moneys in respect thereof:—

Held, that the members of the council who were sued, having acted in good faith, and under the *bond fide* belief that they were doing their duty as trustees for the body of ratepayers in paying out of the general funds of the municipality for what was practically a new sidewalk, even

if they had misconstrued the meaning of the statutes, which was by no means clear, at all events acted honestly and reasonably, and were entitled to be excused for the alleged breach of trust.

Semble, that 62 Vict. (2) ch. 15, sec. 1 (O.), applied to these defendants; but, if it did not, they should not be more hardly dealt with than ordinary trustees, and should be treated as within its equity. *King v. Matthews*, 228.

9. *Plebiscite—Aid to Sanatorium — Injunction.*]—There is nothing in the Municipal Act permitting a municipal council to take a plebiscite and there is no express prohibition against their doing so.

Taking a vote of the electors upon questions or upon unauthorized by-laws is open to grave objections, and a council which sought to take such a vote on the question of a money grant in aid of a sanatorium, which they had not power to make, with a view to inform the Legislature of the result, and, if favourable, to use the result as an argument in attempting to obtain for the council legislative authority to make the grant, were restrained from doing so. *Helm v. Town of Port Hope* (1875), 22 Gr. 273, followed. *King v. City of Toronto*, 163.

10. *Public Libraries—Aid by Municipality—Grant for Site—Validity of By-law—Assent of Electors.*]—A mechanics'

institute having been converted into a public library and a board of management organized under Part II. of R.S.O. 1897, ch. 232, a grant of a sum of money for the purchase of a site was made by by-law of the corporation of the town in which the library was situate without the assent of the electors to either the appointment of the library board or to the grant :—

Held, that the power to grant aid to free libraries was absolutely in the hands of the local municipality under the general provisions of the Municipal Act, and that the by-law was valid notwithstanding sec. 18 of R.S.O. 1897, ch. 232, which might have its full and legitimate scope by being applied to the raising of ways and means by means of the requisitionary powers intrusted to the particular free libraries under secs. 14 and 18 of the Act. *Hunt v. Town of Palmerston*, 76.

See COMPANY, 2, 3—LANDLORD AND TENANT, 3—WAY.

MUNICIPAL ELECTIONS.

See MUNICIPAL CORPORATIONS, 3-7.

NEGLIGENCE.

Horse on Highway—Injury to Boy — Contributory Negligence.—Defendant's horse was on the highway, having escaped from a field which was fenced

in, when a boy of twelve years of age tried to catch him by taking hold of a rope then around his neck, and in doing so he was kicked and injured. There was no evidence either that the defendant knew the horse was accustomed to stray or had any vicious propensity, or had any such fault, and there was evidence that it had been interfered with by several boys, of whom the injured boy was one, and that the latter had more than ordinary intelligence, and fully understood the risk he ran.

In an action for the injury by the boy and his father :—

Held, that they could not recover. *Patterson v. Fanning* (1901), 2 O.L.R. 462, distinguished. *Flett v. Coulter*, 375.

See MASTER AND SERVANT—RAILWAY, 1, 3-6—STREET RAILWAYS—WAY.

NEW TRIAL.

See CRIMINAL LAW, 1 — STREET RAILWAYS, 2.

NOTICE OF ACCIDENT.

See WAY, 1.

NOTICE OF TRIAL.

See PLEADING, 3.

OFFICIAL REFEREE.

See PRACTICE, 2.

ONTARIO ELECTION ACT.

See PARLIAMENTARY ELECTIONS—PENALTIES AND PENAL ACTIONS, 2, 3.

ONTARIO LIQUOR ACT, 1902.

See CRIMINAL LAW, 2—INTOXICATING LIQUORS.

PARLIAMENT.

See CONSTITUTIONAL LAW—PARLIAMENTARY ELECTIONS.

PARLIAMENTARY ELECTIONS.

1. *Controverted Election—Appeal—Settlement of Case.*—No machinery has been provided by the Ontario Controverted Elections Act or by the Rules for the settlement of a case upon an appeal to the Court of Appeal from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court.

Semble, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal. *Re South Oxford Provincial Election, McKay v. Sutherland*, 58.

2. *Corrupt Practices—Agency—Delegates to Nominating Convention—Authorization—Treating—Meetings of Electors—Treating by "Candidate"—Previous Habit of Treating—Rebuttal of Presumption—Absence of Corrupt Intent.*—The respondent was nominated as a

candidate for election as a member of the Legislative Assembly for Ontario by a party convention, and, in acknowledging and accepting the nomination, he said: "There are three things essential to success: first, a good cause; second, proper organization; third, hard work. The first we have; the second and third will largely depend on you:"—

Held, that the respondent by these words constituted every delegate who was present his agent, and became responsible for all that was afterwards done by them in organization and work for the purpose of the election.

The respondent requested M., who was at the convention as a delegate, to go with him to a factory and introduce him to the workmen, some of whom were voters. M. did this, and the respondent addressed the workmen on behalf of his candidature. After the meeting was over, and the workmen had dispersed, M. asked the foreman to have a drink at a neighbouring inn, which the foreman declined, M. also said that if the workmen who went in that direction would come over, he would "leave a drink for them there."

This conversation was not in the presence of the respondent, nor heard by him. When the men were leaving their work for the day, the foreman told them what M. had said, and eight or ten of them called at the inn and got a drink of beer without paying for it:—

Held, that a charge of treating a meeting assembled to promote the election, under sec. 161 of the Ontario Election Act, failed upon this evidence, for the meeting had come to an end before anything was said about the treating, and the men were not told anything about it till nearly three hours afterwards. Nor did the evidence support a charge under sec. 162 (1) of corrupt treating of individuals in order to be elected, M. being a customer of the factory and following a previous habit in his intercourse with the men.

Upon a charge of treating a committee meeting held at a hotel, the evidence was that McC., one of the delegates to the convention, brought into the room where the meeting was being held a box of cigars for the use of the members of the committee. He said he did it at the request of the landlord. It was not shewn by whom payment was made:—

Held, that the charge was not proved, for it is the person at whose expense the treat is supplied, or who pays or engages to pay for it, who alone is guilty of the offence.

The respondent admitted that he had treated on the day of the convention, after the convention was over, several times, at at least two hotels, several persons, some of whom might have been electors. He denied, however, that the treating had any relation to the election:—

Held, that under sub-sec. 2 of sec. 162 (added by 62 of Vict. (2)

ch. 5, sec. 7 (O.)), treating generally or extensively or miscellaneously is only *prima facie* a corrupt practice. If it be shewn that the treating was not in fact done corruptly in order to be elected or for being elected or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of sub-sec. 2. There may still be innocent treating, though, if it be general or extensive or miscellaneous, the onus of shewing that it is innocent is upon the respondent. And an antecedent habit of treating must still help, among other things, to rebut the inference of corrupt intent.

Held, also, that, although the respondent did not become a "candidate," within the meaning of sec. 2, sub-sec. 8, until the 27th March, yet if any corrupt acts in relation to the election were done by him before that date, they would affect the election, for the Act applies to everything done at any time before an election by a person who is afterwards elected.

Youghal Election (1869), 3 Ir. R. C. L. 530, 1 O'M. & H. 291, followed.

It was shewn that the respondent and his chief agent had on several occasions in the course of the canvass treated in bars. The respondent was a physician, with a large country practice, and constantly on the road. He was also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not

disputed that while on the road he was in the constant habit of treating, and he continued to treat after his nomination by the convention on the 1st February until the writ of the election was issued, on the 22nd April:—

Held, that no corrupt intent having been shewn in any of the instances of treating proved, the election was not thereby avoided.

West Wellington Case (1895), 2 E. C. 16, distinguished. *Re East Middlesex Provincial Election, Rose v. Rutledge*, 644.

3. *Voters' Lists*—*Notice of Appeal*—*Leaving at Clerk's Residence*.]—The language of R.S.O. 1897, ch. 7, sec. 17, subsec. 1, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc., means, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time allowed by the statute.

And where, between 9 and 10 o'clock of the evening of the last day for serving notices of appeal, certain notices were left on the outside knob of one of two doors of the clerk's dwelling house, by a person who first knocked but received no response, and such notices did not come to the knowledge of the clerk till about noon the next day, the service was held insufficient. *Re Voters' Lists of Hungerford*, 63.

See PENALTIES AND PENAL ACTIONS, 2, 3.

PART PERFORMANCE.

See SPECIFIC PERFORMANCE, 2.

PARTIES.

1. *Joinder of Defendants*—*Alternative Claims*—*Con. Rule 186*.]—A machine sold by the plaintiffs was burnt while in the premises of the defendant railway company at the place for its delivery to the purchaser. The plaintiffs brought this action against the railway company as carriers for the value of the machine and in the alternative against the purchaser for the price:—

Held, that this could not be done, the relief claimed against the railway company being based on the assumption that the title to the machine was in the plaintiffs, and that against the purchaser on the assumption that title had passed to him.

Quigley v. Waterloo Manufacturing Co. (1901), 1 O.L.R. 606, and *Evans v. Jaffray* (1901), 1 O.L.R. 614, applied. *Chandler and Massey, Limited, v. Grand Trunk R.W. Co.*, 589.

2. *Joinder of Plaintiffs*—*Amendment*—*Con. Rules 185 and 206*.]—*Con. Rule 206* is to be read in connection with *Con. Rule 185*, and parties to an action who might have been joined under the latter may be added

by way of amendment under the former.

In an action brought against a street railway company for damages for running an electric car into and colliding with the plaintiff and his horse and wagon in which his son was seated with him, who was also injured :—

Held, that the son should be added as a party plaintiff by his father as next friend in an action already commenced by the father alone. *Liddiard v. Toronto R. W. Co.*, 371.

3. *Unincorporated Association—Religious Body.*]—The Salvation Army, the duly appointed officers of which are entitled under R.S.O. 1897, ch. 162, to solemnize marriages, and which, under R.S.O. 1897, ch. 307, may hold property in Ontario, may be sued in the Courts of Ontario. *Kingston v. Salvation Army*, 585.

4. *Unincorporated Association—Service of Writ of Summons—Agent.*]—The right to maintain an action or the liability to be sued can only be by or against persons as individuals, or as a corporation or a partnership, or where individuals are carrying on business in a name other than their own, or where they have been given the capacity to own property and to act by agents.

A local union of workmen, a purely voluntary association, without such capacity, are not

liable to be sued; and a writ served upon the agent was therefore set aside.

Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426, distinguished.

Where it clearly appears that the association sued is not an entity, which may be sued by the name it bears, it is more convenient to set aside the service of the writ on a motion made therefor, than to allow the case to proceed to trial with a certainty of its ultimate dismissal. *Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, 424.

See CONTEMPT OF COURT—COSTS, 7—PARTITION—SPECIFIC PERFORMANCE, 1—TRADE UNION.

PARTITION.

Parties — Tenants in Common — Lease — Infant — Repudiation.]—The plaintiff, having when he came of age repudiated a lease to the defendants of land of which he and his brother and sister were tenants in common, made when he was an infant, and having made a partition by deed with his brother and sister, to which the defendants were not parties :—

Held, MACLENNAN, J.A., dissenting, that the brother and sister were necessary parties to

the plaintiff's action for a partition as against the defendants in respect of their possession under the lease.

Judgment of a Divisional Court, 4 O.L.R. 36, reversed, and judgment of MEREDITH, C.J., *ib.*, restored. *Monro v. Toronto R. W. Co.*, 483.

PAYMENT.

See CONSTITUTIONAL LAW, 2.

PAYMENT INTO COURT.

See COSTS, 3.

PENALTIES AND PENAL ACTIONS.

1. *Liquidated Damages or Penalty — Sale of Land — Specific Performance — Extension of Time for Payment.*]—After judgment by vendors of land for specific performance, and before issue of the same, the parties entered into an agreement for an extension for three months of the time for payment of the purchase money, upon the purchaser paying down \$500, and providing that if the defendant should pay the balance of the purchase money within the time limited by the judgment, the plaintiff should give credit to him upon the said balance for \$500, but that if he should fail to do so, then the plaintiff should not be bound to give such credit, and in that respect time should be of the essence of the contract. A few

days after the expiry of the time limited by the judgment the purchaser tendered the purchase money, less the \$500, which the vendor refused to accept:—

Held, that the above provision was of the nature of a forfeiture, and not of liquidated damages, and that the purchaser was entitled to be relieved from the terms of the judgment, and to have a conveyance of the property, after payment of the balance due, less the \$500. *Empire Loan and Savings Co. v. McRae*, 710.

2. *Ontario Election Act — Bribery—Recovery of Penalty by Action—Agent at Poll—Certificate—Neglect to take Oath of Qualification—Reduction of Penalty.*]—An action will not lie under sec. 195 of the Ontario Election Act, R.S.O. 1897, ch. 9, for the pecuniary penalty of the offence of bribery prescribed by sec. 159, sub-sec. 2, as amended by 63 Vict. ch. 4, sec. 21, until after conviction.

The defendant was found guilty of bribery, on the evidence, and the claim for a penalty was dismissed without costs.

The defendant was held liable to a penalty of \$400 under sec. 94, sub-sec. 5, of the Act, for voting at a polling place where he was acting as an agent of a candidate, under a certificate of the returning officer, without having taken the oath of qualification, but the penalty was

reduced to \$40, as in the next case. *Carey v. Smith*, 209.

3. *Ontario Election Act—Person Voting Knowing that he has no Right to Vote—Wilfully Voting without Qualification—Agent at Poll—Certificate—Neglect to Take Oath of Qualification—Reduction of Penalty.*—The defendant, having shortly before an election for the Legislative Assembly of Ontario removed from his farm in the neighbourhood of a city into the city itself, applied for and obtained registration as a city voter, not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situated, at a polling place other than that for the subdivision in which he had formerly resided, and received from the returning officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, and voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could not vote:—

Held, that the defendant was not liable to the penalty imposed by sec. 168 of the Ontario Election Act, R.S.O. 1897, ch. 9, for voting knowing that he had no right to vote.

South Riding County of Perth (1895), 2 E.C. 30, followed.

2. That the defendant was not liable to the penalty imposed by sec. 181 of the Act, for wilfully voting without having at the time all the qualifications required by law. "Wilfully voting" as in this section, and applying it to the facts of the case, was practically the same as voting knowing that he had no right to vote.

3. That the defendant was liable to the penalty of \$400 imposed by sec. 94, sub-sec. 5, of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate; but, as the defendant was not asked to take the oath, the deputy returning officer not having been aware that it was necessary, and the plaintiff himself was present when the defendant voted, and did not object, the provisions of R.S.O. 1897, ch. 108, should be applied, and the the penalty reduced to \$40. *Smith v. Carey*, 203.

PLEADING.

1. *Amended Statement of Claim—Delivery of—Irregularity—Time—Validating Order—Terms—Costs—Stay of Proceedings—Appeal—Waiver—Compliance with Terms.*—After the delivery of the statement of claim an order for particulars was made, and the time for delivering the defence was

extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff, without leave and without the defendant's consent, delivered an amended statement of claim :—

Held, that the delivery of the amended statement of claim was irregular under Rule 300.

An order was made, upon the defendant's application to set aside the amended statement of claim for irregularity, validating the delivery of it, but directing that the plaintiff should pay the costs of the motion and other costs occasioned by the irregularity, and that until payment of such costs further proceedings on the charges introduced by the amendment should be stayed, or if such costs should not be paid within one month after taxation that the amendments should be struck out.

Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms, does not preclude him from moving against the order. *Anthony v. Blain*, 48.

2. *Counterclaim—Breach of Contract—Defendant by Counterclaim out of Jurisdiction—Conspiracy to Defraud.*—The plaintiffs, an English company, brought an action against the defendants, in Ontario, to restrain them from exporting

goods to and interfering with their business in Australia, in breach of certain agreements; and the defendants, besides setting up as a defence certain breaches of the agreements by the plaintiff company, counterclaimed against the plaintiff company for damages for such breaches; for a declaration of their rights as to trade with Australia; and a rectification of the agreements, to make them conform to the representations of the plaintiff company. The defendants also counterclaimed against the plaintiff company, G. and P., two persons not parties to the action, one resident in Ontario and one in Australia, and an Australian company, alleging a conspiracy by them to defraud and cheat the defendants out of certain rights to trade marks they were entitled to in Australia under the agreement by the plaintiff company assigning said trade marks to said G. and P., who, with the Australian company, fraudulently put in force the trade mark laws of Australia and prevented the defendants exporting their goods to Australia and obstructed them in their business :—

Held, that the claims made in the counterclaim against the plaintiff company alone were proper subjects of a counterclaim in the action. But

Held, also, that there was no such intimate connection between the subject of the action and the subject of the counterclaim against three other parties,

only one of whom was resident within the jurisdiction or had admitted the jurisdiction of the Court, as to oblige the Court to require both to be disposed of in the same action.

South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord, [1897] 2 Ch. 487, followed. *Dunlop Pneumatic Tyre Co. v. Ryckman*, 249.

3. *Leave to Deliver Reply—Time—Jury Notice—Discretion—Notice of Trial—Close of Pleadings.*]—Where an order was made by the Master in Chambers allowing the plaintiff to deliver a reply after the regular time for replying had expired, a Judge refused to interfere with the discretion exercised, although the reply was open to the objection that all that it sought to put in issue was already in issue by the statement of defence, the purpose being to enable the plaintiff to file a jury notice, and the case being one in which the plaintiff should be allowed to file a jury notice, and thus leave it to the discretion of the Judge at the trial to say whether it should be tried with or without a jury.

The pleadings were not closed until the lapse of four days (excluding the Christmas vacation) after the delivery of the reply, or until the defendants had joined issue, and a notice of trial given before the lapse of that time, and without a joinder of issue having been delivered, was irregular; and the Judge

had no power to allow the notice of trial thus irregularly given to stand.

Rules 257, 258, 262, considered. *Qua v. Canadian Order of Woodmen of the World*, 51.

See ASSESSMENT AND TAXES
—DEFAMATION, 1—JUDGMENT
—LIMITATION OF ACTIONS, 1—
TRADE UNION.

PLEBISCITE.

See MUNICIPAL CORPORATIONS, 9.

POWER OF ATTORNEY.

See COMPANY, 4.

PRACTICE.

1. *Agreement of Counsel—Misunderstanding—Judgment—Setting aside.*]—In a proceeding before a local Master in a mechanic's lien matter an understanding was arrived at between counsel for the plaintiff and defendant and was verbally communicated to the Master. When the time arrived to act on the understanding counsel disagreed in their recollection of what the understanding was:—

Held, that a decision given by the Master, whose recollection of the understanding was the same as that of the plaintiff's counsel, in favour of the plaintiff, must be reopened and the matter referred back, as the parties were not *ad idem*.

Wilding v. Sanderson, [1897] 2 Ch. 534, specially referred to. *Beaudry v. Gallien*, 73.

2. *Drainage Referee—Official Referee—Reference—Statutes.*—The Drainage Referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee.

Provisions of the Judicature, Arbitration, and Drainage Acts, discussed.

Decision of a Divisional Court, 4 O.L.R. 97, reversed. *McClure v. Township of Brooke*, *Bryce v. Township of Brooke*, 59.

3. *Stay of Reference pending Appeal—Rules 826, 827, 829—Ruling of Master in Ordinary—Appeal from—Forum.*—A judgment directed the Master in Ordinary to make partition of lands; ordered that the parties should execute and deliver all necessary conveyances, to be settled by the Master, and should give possession to each other in accordance therewith; and directed the Master to ascertain the plaintiff's damages for ouster, mesne profits, and waste. The defendants appealed from the judgment to the Court of Appeal, and gave the security provided for by Rule 826:—

Held, that the reference was stayed pending the appeal.

Construction and application of Rules 827 and 829.

The ruling of the Master that the reference was not stayed was a ruling upon a question of practice, and therefore came within the exception in sec. 75 (2) of the Judicature Act, R.S.O. 1897, ch. 51; and an appeal from his ruling lay to a Judge in Court. *Monro v. Toronto R. W. Co.*, 15.

4. *Writ of Summons—Renewal of—Grounds for—Sufficiency of.*—Where an ex parte order for the renewal of a writ of summons on the ground of inability to discover the defendant's place of residence was obtained, a motion to set aside such order was refused, although it was shewn that the defendant had never changed his place of residence, and that it could readily have been ascertained from the directory, the local Master who made the ex parte order having been satisfied as to the efforts made to effect such service, and nothing having been withheld from him.

Howland v. Dominion Bank (1892), 15 P.R. 56, and *Mair v. Cameron* (1899), 18 P.R. 484, distinguished. *Canadian Bank of Commerce v. Tennant*, 524.

See APPEAL — ARBITRATION AND AWARD, 1—BILLS OF EXCHANGE—CONTEMPT OF COURT—COSTS—DEFAMATION, 1—EVIDENCE—JUDGMENT—LIEN—LUNATIC—MORTGAGE—PARLIAMENTARY ELECTIONS, 1—PARTIES—PLEADING—SOLICITOR.

PRINCIPAL AND AGENT.

See BANKS AND BANKING—
CONSTITUTIONAL LAW, 2—SPECIFIC PERFORMANCE, 1.

PRIVILEGE.

See DEFAMATION, 2.

PROHIBITION.

See DIVISION COURTS.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW—
INTOXICATING LIQUORS.

PUBLIC LIBRARIES.

See MUNICIPAL CORPORATIONS, 10.

PUBLIC SCHOOLS.

See SCHOOLS.

QUEBEC CODE.

See COSTS, 1.

RAILWAY.

1. Carriage of Goods—Shipping Bill—Bill of Lading—Condition Requiring Insurance—Breach of—Loss of Goods

—*Negligence.*—Under sec. 246 of the Dominion Railway Act, a railway company is precluded from setting up a condition indorsed on a bill of lading relieving the company from liability for damage sustained to goods while in transit, where the damage is occasioned through negligence.

Consignors by their own shipping bill agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of the bill of lading given by the railway company on the shipment of goods, required the consignor to effect an insurance thereon, which, in case of loss or damage, the company were to have the benefit of.

The consignors insured the goods, but afterwards countermanded the insurance:—

Held, that the bill of lading superseded the shipping bill and formed the contract between the parties, and that the railway company under the above section were precluded from setting up the breach of such condition as a ground for relief from liability, where the damage to the goods had been occasioned through negligence. *St. Mary's Creamery Co. v. Grand Trunk R. W. Co.*, 742.

2. Farm Crossing—Obligation to Provide—Dominion Railway Act—Midland Railway Company—Ontario Statutes.]—The plaintiff's father in 1882 conveyed part of his farm

to the Midland Railway Company, who constructed their railway so as to sever the farm, but did not agree to make a farm crossing. In 1900 the father conveyed to the plaintiff all the farm not previously conveyed to the railway company:—

Held, that the plaintiff could not compel the defendants, who had acquired the Midland Railway in 1893, to provide a farm crossing, either by virtue of the Dominion Railway Act or of Ontario legislation applicable to the railway before 1893.

Review of the statutes affecting the Midland Railway Company.

Ontario Lands and Oil Co. v. Canada Southern R.W. Co. (1901), 1 O.L.R. 215, followed. *Carew v. Grand Trunk R.W. Co.*, 653.

3. *Negligence—Alighting from Train while in Motion—Contributory Negligence.*—The fact of a passenger getting off a train while it is in motion is not necessarily negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances.

Where a train, scheduled to stop at a named station, did not on arriving there stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started again, fell and was injured, and it was found by the jury on the

evidence that he acted as a reasonable man would do under the circumstances, the Court declined to interfere with the finding. *Keith v. Ottawa and New York R.W. Co.*, 116.

4. *Negligence—Assaults on Passengers—Duties of Conductor—Admissibility of Evidence.*—The plaintiff, a ticket holder and passenger on one of the defendants' trains, was, without any provocation, assaulted several times by a drunken man. The conductor did not see the assaults, but was told of them, and of the assailant's threats to continue them, and yet refused to restrain the latter or to put him off the train:—

Held, that the defendants' duty to the plaintiff as a passenger was to carry him to his destination, and use reasonable care and diligence in providing for his comfort and safety while so conveying him; and that it was for the jury to decide whether the conductor had acted reasonably and diligently, and judgment upon a verdict of the jury in the plaintiff's favor was affirmed.

Held, also, that evidence was rightly rejected of improper relations between the plaintiff and the wife of his assailant, alleged as provocation for the assaults.

Pounder v. North Eastern R. W. Co., [1892] 1 Q.B. 385, discussed. *Blain v. Canadian Pacific R.W. Co.*, 334.

5. *Negligence — Crossing — Speed of Trains—Fences—Statutory Requirements — Injury to Person Crossing Track — Contributory Negligence—Findings of Jury.*]—By the Dominion Railway Act, 1888, sec. 197, as amended by 55 & 56 Vict. ch. 27, sec. 6, it is provided that “at every public road crossing at rail level of the railway, the fence on both sides of the track shall be turned in to the cattle guards so as to allow the safe passage of trains.” By sec. 259 of the former Act, as amended by sec. 8 of the latter, it is provided that “no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act:”—

Held, that the words “in the manner prescribed by this Act” do not refer to the turning in of the fence to the cattle guards; and, although no other fence is specifically prescribed in the railway legislation, the meaning of sec. 259 is, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveller while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour.

The plaintiff was struck by a train at a crossing over a main

street in an incorporated town, not protected by a gate or watchman. In an action to recover damages for his injuries, the jury found that the train was travelling at the rate of twenty miles an hour, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part; and the Court, though there was strong evidence of contributory negligence, declined to interfere. *McKay v. Grand Trunk R.W. Co.*, 313.

6. *Negligence — Defective Fencing—Cattle Getting on to Highway and thence on to Track.*]—The plaintiff was the owner of a field, bounded on one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway, which was crossed by both tracks. Owing to a defect in the fence between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed and going over the land of a private owner, which was not fenced off from the switch, and then along a lane she went on to the highway and then proceeded along it to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train:—

Held, that the defendants were liable therefor.

James v. Grand Trunk R.W. Co. (1901), 31 S.C.R. 420, distinguished. *Davidson v. Grand Trunk R.W. Co.*, 574.

See EVIDENCE, 3—LANDLORD AND TENANT, 3—MASTER AND SERVANT—PARTIES, 1—WAY, 2.

RECEIVER.

See ATTACHMENT OF DEBTS, 1.

REFERENCE.

See PRACTICE, 2, 3.

REFERENDUM.

See CRIMINAL LAW, 2—INTOXICATING LIQUORS.

RELIGIOUS INSTITUTIONS.

See CHURCH—PARTIES, 3.

REVENUE.

1. *Succession Duty — Costs of Litigation.*]—In litigation under the Succession Duty Act express power is given to the High Court to deal with the costs thereof; and where therefore an estate had paid, or was ready to pay, all the duties, which could properly be claimed against it, it was held entitled to the costs of opposing a claim for higher duties. *Attorney-General for Ontario v. Toronto General Trusts Corporation*, 607.

2. *Succession Duty — Dutiable Property — Transfer of Property before Death—Donatio Mortis Causa—Contract for Valuable Consideration — Estoppel — Survivorship.*]—The aggregate value of the estate of an intestate was \$12,877, and of this \$7,540 passed to the hands of his niece by virtue of an agreement between them, given effect to by a *donatio mortis causa*, as established in *Brown v. Toronto General Trusts Corporation* (1900), 32 O.R. 319:—

Held, that the \$7,540 was not dutiable under the Succession Duty Act, R.S.O. 1897, ch. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but made in pursuance of a contractual obligation for value; and the niece not being estopped, by the form of the judgment in her action against the Toronto General Trusts Corporation, from setting up in this action, brought on behalf of the Crown to recover succession duty, that the transfer was not a gift, but the implementing of a contract.

Held, also, that the \$7,540 did not pass by survivorship within the meaning of sec. 4 (d) of R.S.O. 1897, ch. 24. *Attorney-General for Ontario v. Brown*, 167.

3. *Succession Duty—Income Payable for Life or Years—When Duty Payable on Corpus.*]—A testator by his will devised his estate to a corporate trustee, upon trust to collect the income and apply it in their discretion

for the benefit of his children and grandchildren for the period of twenty-one years after his death: and to pay over to the beneficiaries the whole income, without accumulations, for the period between the end of the twenty-one years and the death of the last surviving child, when the corpus was to be divided:—

Held, that there was a plainly marked out period in the future, not sooner than twenty-one years, when the corpus of the estate was to be divided; with a prior interest for life or years according to the event in fact, during which the trustee standing *in loco parentis* was entitled to the present income of the property until the time arrived for the division of the corpus, and that the income only was presently liable to the payment of succession duty. *Attorney-General for Ontario v. Toronto General Trusts Corporation*, 216.

RIVER IMPROVEMENTS.

See CONSTITUTIONAL LAW, 1.

REPLY.

See PLEADING, 3.

RESTRAINT OF TRADE.

See COVENANT.

RETAINER.

See SOLICITOR, 2.

RULES.

Con. Rule 185]—See PARTIES, 2.
Con. Rule 186]—See PARTIES, 1.
Con. Rule 206]—See PARTIES, 2.
Con. Rule 214]—See COSTS, 7.
Con. Rules 257, 258, 262]—See PLEADING, 3.
Con. Rule 425]—See COSTS, 3.
Con. Rule 439]—See EVIDENCE, 3.
Con. Rule 472]—See EVIDENCE, 4.
Con. Rules 826, 827, 829]—See PRACTICE, 3.
Con. Rule 1198 (b)]—See COSTS, 6.
Con. Rule 1208]—See COSTS, 4.
Division Court Rule 4]—See BILLS OF EXCHANGE.

SALE OF LAND.

See PENALTIES AND PENAL ACTIONS, 1—SPECIFIC PERFORMANCE.

SCALE OF COSTS.

See COSTS, 2, 3.

SCHOOLS.

Public School—*Selection of School Site*—*Trustees*—*Rate-payers*—*Difference*—*Award*—*Invalidity*—*Mandamus*—*Estoppel*.]—By sec. 31 of the Public Schools Act, R.S.O. 1897, ch. 292, the trustees of every rural school section shall have power to select a site for a new school house or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of

the ratepayers of the section to consider the site selected. By sub-sec. 2, in case a majority of the ratepayers present at such special meeting differ as to the suitability of the site selected by the trustees, each party shall choose an arbitrator, etc. :—

Held, that it is only in case of a difference between the trustees, on the one hand, and a majority of the ratepayers at a special meeting, on the other, as to a school site *selected* by the trustees, that an arbitration is to be had.

And where a majority of the ratepayers at a special meeting voted in favour of a change of school site, without any selection of site having been first made by the trustees :—

Held, that there was no foundation for an arbitration, and that an award made by arbitrators appointed in the manner prescribed by sub-sec. 2, whether such award was or was not valid on its face, was an absolutely void proceeding, and no answer to a motion by the trustees for a mandamus to the township corporation requiring them to pass a by-law for the issue of debentures to provide funds for the purchase of a school site and the erection of a school house, in pursuance of the vote of the ratepayers.

Quære, whether the award was valid on its face, inasmuch as it did not shew a difference between the trustees and the ratepayers.

Held, also, that there could be no estoppel against the ap-

plicants, or waiver of the public right.

Judgment of a Divisional Court, 4 O.L.R. 272, affirmed. *Re Cartwright Public School Trustees and Township of Cartwright*, 699.

See MUNICIPAL CORPORATIONS, 1, 3, 4, 5.

SEAL.

See COMPANY, 1.

SEARCH WARRANT.

See MALICIOUS PROSECUTION.

SECURITY FOR COSTS.

See COSTS, 4, 5, 6.

SENTENCE.

See CRIMINAL LAW, 2, 6—
INTOXICATING LIQUORS.

SET-OFF.

See COSTS, 2.

SHERIFF.

Bond—Predecessor in Office—Annuity out of Revenues.—Pursuant to the terms of his appointment a sheriff and two sureties gave a bond to his predecessor in office to pay him an annuity “out of the revenues of the said office :”—

Held, that fees received by the sheriff as returning officer at elections of members of

Parliament, and commission earned by him as assignee for the benefit of creditors, formed part of the revenues of the office, and that as far as the revenues of each year so ascertained extended, after deducting necessary disbursements connected with the office during each year, the annuity for that year was payable. *Smart v. Dana*, 451.

SOLICITOR.

1. *Lien—Costs—Lands Subject to Action—Registry of Lis Pendens—Discharge of.*—Con. Rule 1129, which empowers a Court or a Judge to declare that a solicitor, who has been employed to prosecute or defend any case, etc., shall have a lien on the property recovered or preserved through his instrumentality, is to be construed liberally, so as not to deprive the solicitor of his lien.

A *lis pendens* registered by a solicitor against land, the subject matter of a redemption action, wherein costs were incurred by the solicitor, will not be discharged on a motion therefor in Chambers, but will be left for the decision of the trial Judge after the hearing of the evidence. *O'Flynn v. Middleton*, 621.

2. *Limitation of Actions—Retainer—Termination of—Costs Subsequent to Judgment.*—The employment of a solicitor to bring or defend an action, subject possibly to his right to claim payment of his costs on

judgment being given, does not terminate on the giving of judgment, so long as anything remains to be done which it is the solicitor's duty under his retainer to do for his client's protection; and, even in the absence of such duty, where he does not elect to treat the contract as then at an end, but under his client's instructions acts for him thereafter in subsequent proceedings consequent upon the judgment, there is a continuation of such original contract.

Where, therefore, after the giving of judgment in an interpleader issue, the solicitor for the defendant against whom judgment had been given, continued, with the client's knowledge, to act for him in the taxation of the plaintiff's costs, and in the preparation and taxation of certain costs which the defendants were entitled to set off, his appointment continued until the completion of these proceedings, so that as against a claim for the amount of his bill of costs the Statute of Limitations only commenced to run therefrom. *Millar v. Kanady*, 412.

See APPEAL, 2—COSTS, 1—GIFT.

SPECIAL CASE.

See ARBITRATION AND AWARD, 2.

SPECIFIC PERFORMANCE.

1. *Contract by Agent of Purchaser—Action by Agent—Delay of Purchaser—Resale by*

Purchaser—Right of Sub-purchaser to Join Vendor as Party.]

—Where an agent makes a contract for the purchase of land in his own name, the vendor knowing that the agent is acting for another person, whose name is not disclosed, the agent cannot maintain an action in his own name against the vendor for specific performance of the contract.

Where the value of land is uncertain and speculative, the purchaser thereof must act upon his rights with reasonable diligence and promptitude upon pain of losing them.

The owner of land of that character on the 1st May, 1890, contracted to sell it to H., but was never paid anything upon the purchase money, although \$50 was to be paid down, and \$200 in six months, to be secured by H.'s note, which never was given. On the 29th August, 1900, H. contracted to sell the land to the plaintiff acting for an unnamed principal, and the owner was willing to carry out the resale. In September and October, 1900, there was some correspondence about the title, but after that until the 3rd April, 1901, the plaintiff's principal did nothing. On that day he sent the owner a conveyance of the land for execution, but the owner tore it up and said that owing to the delay he would not carry out the contract. On the 9th April, 1901, the plaintiff's principal brought this action, in the name of the plaintiff, for specific performance of

the contract for resale, against H. alone, but took no other steps until the 24th October, 1901, when he obtained an order adding the owner as a defendant, and then served the writ on both defendants. There was such further delay in the prosecution of the action that it was not tried till December, 1902:—

Held, that the whole course of proceedings on the part of the plaintiff's principal shewed that he had been endeavouring to keep alive his claim to the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy it, in case it should depreciate; and the action should be dismissed as against both defendants.

Held, that the owner was properly joined as a defendant; the foundation of the right against him being that the plaintiff, or his principal, was the equitable owner under his contract with H. of H.'s rights against the owner of the land, and might join the latter upon offering to perform H.'s contract. *Smith v. Hughes*, 238.

2. *Taking Possession—Acts Constituting Part Performance.*—Possession is part performance both by and against the stranger and the owner.

On negotiations for the purchase of land, the owner's agent told the defendant that the lot was his. Defendant went on the lot and set in the ground a number of stakes to mark out the foundation of a proposed

house, and then changed his mind and refused to carry out the purchase:—

Held, that what he had done constituted such a taking of possession as to constitute part performance, and that the plaintiff was entitled to the usual judgment for specific performance. *Bodwell v. McNiven*, 332.

See PENALTIES AND PENAL ACTIONS, 1.

STATEMENT OF CLAIM.

See PLEADING, 1.

STATUTES.

5 & 6 Vict. ch. 45 (Imperial Copyright Act), secs. 18, 19
See COPYRIGHT 1, 2.

30 & 31 Vict. ch. 3 (British North America Act), secs. 91 (13), 102, 108, 109, 117
See CONSTITUTIONAL LAW, 1.

39 & 40 Vict. ch. 36 (Imperial Customs Law Consolidation Act), sec. 152....
See COPYRIGHT, 1.

R.S.O. 1877, ch. 216, (Religious Institutions Act), sec. 19
See CHURCH.

R.S.C. 1886, ch. 97, sec. 11
See CONSTITUTIONAL LAW, 1.

R.S.C. 1886, ch. 127, sec. 7
See CONSTITUTIONAL, 2.

R.S.C. 1886, ch. 183, secs. 19, 25
See CRIMINAL LAW, 6.

50 Vict. ch. 85 (O.)
See COMPANY, 3.

R.S.O. 1887, ch. 164, sec. 99
See COMPANY, 2.

51 Vict. ch. 29 (Dominion Railway Act), sec. 186
See WAY, 2.

51 Vict. ch. 29 (Dominion Railway Act), sec. 246
See RAILWAY, 1.

51 Vict. ch. 29 (Dominion Railway Act), secs. 197, 259
See RAILWAY, 5.

54 Vict. ch. 107 (O.)
See COMPANY, 2.

55 & 56 Vict. ch. 27, secs. 6, 8 (D.)
See RAILWAY, 5.

55 & 56 Vict. ch. 29 (D.) (Criminal Code), sec. 179 (c)
See CRIMINAL LAW, 1.

55 & 56 Vict. ch. 29 (D.) (Criminal Code), secs. 752, 783, 785, 787, 955.
See CRIMINAL LAW, 6.

55 & 56 Vict. ch. 29 (D.) (Criminal Code), sec. 889
See CRIMINAL LAW 4.

R.S.O. 1897, ch. 7 (Ontario Voters' Lists Act), sec. 17, sub-sec. 1
See PARLIAMENTARY ELECTIONS, 3.

R.S.O. 1897, ch. 9 (Ontario Election Act, secs. 2 (8), 161, 162
See PARLIAMENTARY ELECTIONS, 2.

R.S.O. 1897, ch. 9 (Ontario Election Act), sec. 91
See INTOXICATING LIQUORS.

R.S.O. 1897, ch. 9 (Ontario Election Act), secs. 94, 159, 195
See PENALTIES AND PENAL ACTIONS, 2.

R.S.O. 1897, ch. 9 (Ontario Election Act), secs. 94, 168, 181
See PENALTIES AND PENAL ACTIONS, 3.

R.S.O. 1897, ch. 24 (Succession Duty Act)
See REVENUE.

R.S.O. 1897, ch. 51 (Judicature Act), sec. 72
See COSTS, 7.

R.S.O. 1897, ch. 60 (Division Courts Act), sec. 179
See ATTACHMENT OF DEBTS, 1.

R.S.O. 1897, ch. 60 (Division Courts Act), secs. 180, 181
See DIVISION COURTS.

R.S.O. 1897, ch. 62 (Arbitration Act), secs. 3, 41
See ARBITRATION AND AWARD, 2.

- R.S.O. 1897, ch. 62 (Arbitration Act),
sec. 8.....
See ARBITRATION AND AWARD, 3.
- R.S.O. 1897, ch. 62 (Arbitration Act),
secs. 13, 45
See ARBITRATION AND AWARD, 1.
- R.S.O. 1897, ch. 73 (Evidence Act),
sec. 10
See EXECUTORS AND ADMINISTRATORS
—GIFT.
- R.S.O. 1897, ch. 90 (Ontario Summary
Convictions Act), sec. 4.....
See CRIMINAL LAW, 5.
- R.S.O. 1897, ch. 108 (Remission of Pen-
alties Act)
See PENALTIES AND PENAL ACTIONS, 2, 3.
- R.S.O. 1897, ch. 128 (Wills Act of On-
tario), sec. 36.....
See WILL, 2, 9.
- R.S.O. 1897, ch. 153 (Mechanics' Lien
Act), sec. 31 (2).....
See LIEN, 1.
- R.S.O. 1897, ch. 153 (Mechanics' Lien
Act), sec. 42
See LIEN, 2.
- R.S.O. 1897, ch. 157 (Master and Ser-
vant Act).....
See CRIMINAL LAW, 5.
- R.S.O. 1897, ch. 162 (Marriage Act)....
See PARTIES, 3.
- R.S.O. 1897, ch. 163, (Married Wo-
man's Property Act), secs. 3, 5.....
See HUSBAND AND WIFE.
- R.S.O. 1897, ch. 166 (Fatal Accidents
Act).....
See DAMAGES—EVIDENCE, 3—MASTER
AND SERVANT.
- R.O.S. 1897, ch. 191 (Ontario Compan-
ies Act), secs. 47, 48.....
See COMPANY, 1.
- R.S.O. 1897, ch. 194 (Timber Slide
Companies Act)
See WATER AND WATERCOURSES.
- R.S.O. 1897, ch. 203 (Ontario Insurance
Act), sec. 80.....
See INSURANCE, 3.
- R.S.O. 1897, ch. 205 (Loan Corpora-
tions Act), sec. 25
See CONSTITUTIONAL LAW, 2.
- R.S.O. 1897, ch. 223 (Municipal Act),
sec. 76.....
See MUNICIPAL CORPORATIONS, 4.
- R.S.O. 1897, ch. 223 (Municipal Act),
sec. 80.....
See MUNICIPAL CORPORATIONS, 3.
- R.S.O. 1897, ch. 223 (Municipal Act),
sec. 204.....
See MUNICIPAL CORPORATIONS, 7.
- R.S.O. 1897, ch. 223 (Municipal Act),
sec. 435.....
See MUNICIPAL CORPORATIONS, 1.
- R.S.O. 1897, ch. 223 (Municipal Act),
sec. 470.....
See MUNICIPAL CORPORATIONS, 2.
- R.S.O. 1897, ch. 223 (Municipal Act),
sec. 606.....
See WAY, 1.
- R.S.O. 1897, ch. 223 (Municipal Act),
sec. 611.....
See WAY, 2.
- R.S.O. 1897, ch. 224 (Assessment Act),
secs. 152, 153.....
See ASSESSMENT AND TAXES.
- R.S.O. 1897, ch. 232 (Public Libraries
Act).....
See MUNICIPAL CORPORATIONS, 10.
- R.S.O. 1897, ch. 292 (Public Schools
Act), sec. 31
See SCHOOLS.
- R.S.O. 1897, ch. 307 (Religious Institu-
tions Act), sec. 24
See CHURCH—PARTIES, 3.
- 60 & 61 Vict. ch. 11 (D.) (Alien Labour
Act).....
See CRIMINAL LAW, 4.
- 62 Vict. (2) ch. 15, sec. 1 (O.)
See MUNICIPAL CORPORATIONS, 8.
- 62 & 63 Vict. ch. 50, sec. 9 (c) (D.).....
See CONSTITUTIONAL LAW, 1.
- 63 Vict. ch. 4, sec. 21 (O.).....
See PENALTIES AND PENAL ACTIONS, 2.
- 1 Edw. VII. ch. 13 (D.)
See CRIMINAL LAW, 4.
- 2 Edw. VII. ch. 12, sec. 15 (O.).....
See CRIMINAL LAW, 2.
- 2 Edw. VII. ch. 29, sec. 5 (O.).....
See MUNICIPAL CORPORATIONS, 3, 4, 5.

2 Edw. VII. ch. 33 (O.) (Ontario Liquor Act, 1902), sec. 2
See INTOXICATING LIQUORS.

2 Edw. VII. ch. 33 (O.) (Ontario Liquor Act, 1902), sec. 91
See CRIMINAL LAW, 2.

STAY OF PROCEEDINGS.

See CONTEMPT OF COURT—PLEADING, 1—PRACTICE, 3.

STREET RAILWAYS.

1. *Negligence—Car Running backwards—Jury—Answers to Questions.*—The plaintiff was injured by a waggon in which he was being driven, being struck by an electric car of the defendants, which was running backwards in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the Judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed:—

Held, that this was a general

verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded, and was not merely a specific finding in answer to a question.

Per ARMOUR, C.J.O.:—Questions to the jury must be in writing.

Per OSLER, J.A.:—While it is more convenient that questions to the jury should be in writing, the Judge is not bound to adopt that course.

Judgment of FALCONBRIDGE, J., affirmed. *Balfour v. Toronto R. W. Co.*, 735.

2. *Negligence — Conductor's Authority—Evidence—Jury—New Trial.*—Plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down but did not stop, and as it was passing the conductor seized plaintiff's hand and while attempting to help her on board signalled the car to go on again, which it did, and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently:—

Held, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it was slowing up; that the question as to the scope of a conductor's authority is one

of evidence; that there was evidence to go to the jury; and that the effect of it was for them to consider, and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority. Judgment of Street, J., at the trial, reversed. *Dawdy v. Hamilton, Grimsby, and Beamsville Electric R.W. Co.*, 92.

SUCCESSION DUTY.

See REVENUE.

SUPREME COURT OF CANADA.

See APPEAL, 4.

SURVIVORSHIP.

See REVENUE, 2—WILL, 4.

TAX SALE.

See ASSESSMENT AND TAXES.

TENANT FOR LIFE.

See WASTE.

TENANTS IN COMMON.

See PARTITION.

TENDER.

See CONSTITUTIONAL LAW, 2
—MORTGAGE.

THEFT.

See CRIMINAL LAW, 6—MALICIOUS PROSECUTION.

THIRD PARTIES.

See COSTS, 7.

TIMBER.

See WASTE.

TIME.

See APPEAL, 1, 4—ARBITRATION AND AWARD, 1—LANDLORD AND TENANT, 4—MUNICIPAL CORPORATIONS, 7—PENALTIES AND PENAL ACTIONS, 1—PLEADING, 1, 3.

TOLLS.

See WATER AND WATERCOURSES.

TORONTO GAS COMPANY.

See COMPANY, 3.

TRADE MARK.

Infringement—"Caledonia Water"—"Caledonia Mineral Water"—"Water from New Springs at Caledonia."—The plaintiffs for many years had been the owners of mineral springs in the township of Caledonia, the waters of which they had caused to be registered under certain trade marks, and the names "Caledonia Water" and "Caledonia Mineral Water." The water, which was used

medicinally and as a beverage, had, through the plaintiffs' exertions and the expenditure of large sums of money, become very widely known as water from Caledonia springs. Around the springs a village, laid out on the ground many years ago, came into existence, and some years ago the plaintiffs erected a hotel, and procured a railway station and post office to be located there under the name "Caledonia Springs." In 1898 L. & Co., who had purchased a lot about a quarter of a mile from the plaintiffs' place, had, by sinking an artesian well, tapped springs, from which water flowed similar in some respects to the plaintiffs', which they supplied in barrels to their agents as "water from the new springs at Caledonia," which these agents bottled and sold. The bottles used were similar in shape and size to the plaintiffs'. One of the agents, T. & Co., had, at the time of the commencement of the action, been using labels thereon resembling the plaintiffs', and selling the water as Caledonia water, but this had never been sanctioned by L. & Co., and was at once abandoned :—

Held, Moss, C.J.O., dissenting, that the defendants could not be restrained from using the word "Caledonia" as they did in designating the water sold by them, and that the injunction granted herein should be dissolved with costs, except as to T. & Co. *Grand Hotel Co. of Caledonia v. Wilson, Grand*

Hotel Co. of Caledonia v. Tume, 141.

TRADE UNION.

Inducing Breach of Contract—Interference with Business—Pleading—Parties—Incorporation.]—Damages are recoverable against a local trade union and the members thereof in an action by employers of workmen when by means of threats, abusive language, and a system of espionage, the workmen are induced to break their contracts of employment with the employers, and other workmen are prevented from entering into the employment in their stead. And a foreign officer of an organized body of which the local trade union was a part, who came to this Province and aided, encouraged, and directed the members in their unlawful acts, was held liable with them for the consequences.

After a trade union has appeared and pleaded in an apparently corporate capacity, it is too late at the trial to raise the objection that it is not in fact incorporated or liable to be sued. Such an objection must be specially pleaded. *Krug Furniture Co. v. Berlin Union of Amalgamated Woodworkers*, 463.

See CONTEMPT OF COURT—PARTIES, 4.

TRESPASS TO LAND.

See COSTS, 3—MUNICIPAL CORPORATIONS, 2.

TRIAL.

See PLEADING, 3—PRACTICE
2—STREET RAILWAYS.

TRUSTS AND TRUSTEES.

See MUNICIPAL CORPORATIONS
8—SCHOOLS.

VENDOR AND PURCHASER.

See SPECIFIC PERFORMANCE—
WILL, 4.

VOLUNTARY CONVEYANCE.

See DOWER.

VOTERS' LISTS.

See PARLIAMENTARY ELEC-
TIONS, 3.

WAIVER.

See COSTS, 5—COVENANT—
PLEADING, 1.

WARRANTY.

See CONTRACT, 1.

WASTE.

*Charge of Annuity — Life
Tenant and Remainderman—
Apportionment — Damages —
Scanty Security—Timber.*]—A
testator seised in fee of land,
subject to a mortgage to secure
an annuity for his wife, devised

the land for life, remainder over
in fee. After his death the life
tenant continued to pay the
annuity to the widow. She also
sold the timber on the land,
claiming the right to do so on
account of her payments on the
annuity; and the purchaser hav-
ing begun to cut the timber, this
action was commenced by the
remainderman to restrain
waste:—

Held, following *Yates v. Yates*
(1860), 28 Beav. 637, that the
periodical payments of the an-
nuity must be treated partly as
interest which the tenant for
life had to pay, and partly as
principal for which she would
have a charge on the inherit-
ance, in the proportion which
the value of the life estate bore
to the value of the reversion.
Whitesell v. Reece and Payne,
352.

WATER AND WATERCOURSES.

*Injury to Land by Flooding
—Claim for Damages—Sum-
mary Procedure—Costs of Ac-
tion—Erection and Mainte-
nance of Dam—Liability of
Owners—Tolls—Liability of
Lumbermen Using Dam—In-
junction.*]—The judgment of
Street, J., 4 O.L.R. 293, was
affirmed for the reasons given
by him; and, in addition to the
damages awarded to the plain-
tiff against the added defend-
ants, an injunction was granted
restraining those defendants
from penning back the waters
of the river in question, but the

operation of the injunction was suspended for a year to enable those defendants to acquire the right to overflow the plaintiff's land, under the provisions of R. S.O. 1897, ch. 194, or otherwise. *Neely v. Peter*, 381.

WAY.

1. *Municipal Corporation—Negligence—Non-repair of Bridge—Absence of Railing—Sufficiency of Notice.*]—The plaintiff was crossing a bridge in the defendant township during a thunderstorm at night on the night of 6th May, 1902, when lightning caused his horse to swerve, and its foot went into a gap in the logs of the bridge close to the edge, and there being no railing they all fell over the side, and the plaintiff was injured. On 26th May he gave notice to the defendants of the accident as having occurred on 7th May, instead of on 6th May, but describing the circumstances, and also that he had sought the aid of a neighbour whom he named:—

Held, that the cause of the accident was the negligence of the defendants in not providing a railing, and that the thunderstorm was one of those ordinary dangers which ought to have been thus provided against.

Held, also, that the notice given to the defendants was sufficient within sub-sec. 3 of sec. 606 of the Municipal Act. *McInnes v. Township of Egremont*, 713.

2. *Municipal Corporation—Railway Crossings—Liability to Repair—Municipal Act—Railway Act.*]—By sec. 611 of the Municipal Act, R.S.O. 1897, ch. 223, first introduced into the Municipal Act in 1896, no liability is now imposed on a municipal corporation for want of repair of a railway crossing by reason of its being of too high a grade and the omission to fence, the obligation therefor being under sec. 186 of the Railway Act, 51 Vict. ch. 29 (D.), solely on the railway company. *Hollden v. Township of Yarmouth*, 579.

See MUNICIPAL CORPORATIONS, 8—RAILWAY, 6.

WILL.

1. *Charitable Bequest—Proceeds of Realty and Personalty.*]—A testator who died on the 12th April, 1895, by his will made the 6th September, 1894, directed land to be sold and out of the proceeds thereof and some personalty directed \$2,000 to be paid to N. W. for the use of the Reformed Presbyterian Church, such sum to be expended by N. W. in the manner best calculated by him to advance the principles of that church. N. W. assigned the whole fund to the church:—

Held, a good charitable bequest.

Held, also, that the assignment by N. W. to the trustees of the church was a valid exer-

cise of the discretion given him by the will.

Judgment of BOYD, C., affirmed. *Re Johnson, Chambers v. Johnson*, 459.

2. *Construction* — “*All my Children*” — *Children of Predeceased Child.*] — The testator by his will directed that after the death of his wife his estate should “be divided amongst all my children.” One daughter died, leaving issue, before the execution of the will :—

Held, that the daughter’s children did not take directly under the will, nor by virtue of sec. 36 of the Wills Act of Ontario, there being no gift to their parent. *Re Williams*, 345.

3. *Construction* — *Devise* — *Vested Estate, Subject to be Divested* — *Rents* — *Expenditure for Improvements.*] — Testator devised a farm to his grandson “when he arrives at twenty-one years of age, the said farm to be kept in repair by my executors . . . to expend at least \$50 each year in improvements,” with a devise over in case of death “before receiving the share,” and a residuary devise to a son and daughter :—

Held, that the land vested in the grandson by the will, subject to be divested should he die before attaining twenty-one, and that he was entitled to the benefit of the surplus of rents over and above what should be properly expended for repairs, which was to be not less than \$50 each

year, but more if necessity should, in the opinion of the executors, arise. *Re Dennis*, 46.

4. *Construction* — *Life Estate* — *Estate Tail* — *Survivorship* — *Disentailing Deed* — *Condition of Devise* — *Bearing Testator’s Name* — *Vendor and Purchaser.*] —

A testator devised the lands “whereon I now reside” to his son “during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever, and in default of a second male heir to their eldest surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life.” The testator’s son had by the wife mentioned in the will four children, one son and three daughters, of whom one son and one daughter survived the testator’s son and his wife. One of the daughters who predeceased the testator’s son had previously joined with him in a disentailing deed in which it was recited that she was the tenant in tail in remainder expectant upon the decease of her father :—

Held, that the testator’s son took a life estate only, and the surviving daughter an estate tail male ; and that the disentailing deed did not stand in the way of that daughter making a conveyance of the lands in fee.

Held, also, that the condition as to continuing to bear the testator’s name did not prevent the daughter from conveying in fee. *Re Brown and Slater*, 386.

5. *Construction—Life Estate—Remainder to Heirs*—"Then Surviving."]—A testator devised land to his wife "during the full term of time that she remains my widow and unmarried" and subject thereto to two sons "during the full term of time of their natural lives . . . and if either of my said sons should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share of the said lands for the time being, and after the decease of both my said sons, the before mentioned land and premises shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respectful lawful heirs then surviving them share and share alike :"—

Held, that the will gave a life estate for the joint lives of the two sons, with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest liver of the two sons. *Haight v. Dangerfield*, 274.

6. *Construction—Speaking from the Death—R.S.O. 1897, ch. 128, sec. 26, sub-sec. 1—Generic Bequest—"Now"—"Stock and Trade"—Omission of Words of Donation.*]—A testator provided as follows, "I give, devise, and bequeath all my real and personal estate of which I may die possessed or interested in, in the manner following, that is to say, first, I give to my sister the house and land with all household furniture and all the

stock and trade now in house and out of house with all book accounts now due me wherever found for her own use and benefit forever, and out of this . . . she shall \$100 lawful money of Canada to my brother for his own use and benefit forever :"—

Held, that, although the gifts of the household furniture and the stock-in-trade and book debts were specific bequests, yet being specific bequests of that which is generic,—of that which may be increased or diminished,—the household furniture, including a number of books, stock-in-trade, and book debts, as they existed at the time of the testator's death, passed to the devisee, and the use of the word "now" did not limit the gift to them as they existed at the date of the will.

Held, also, that money of the testator on deposit in the bank, cash in hand, and certain promissory notes given in settlement of book debts, and a quantity of cordwood for use in the shop and dwelling house, two horses, harness and vehicles, were embraced in the gift of the "stock and trade."

Held, further, that the brother was entitled to the legacy of \$100, notwithstanding the omission of the word "pay" after the word "shall." *In re Holden*, 156.

7. *Devise—Use of House and Allowance—Care in Institution in the Alternative—Exercise*

of Judgment—Reasonableness.]

—A testator by his will gave the defendant all his estate on condition . . . that he pay the plaintiff \$50 a month and that she have the use of his house and furniture for her life; and by a codicil provided that if the defendant in his own absolute judgment was of opinion that it would be best for her to be cared for in some institution, he should have the right and authority to place her there, and that if the institution was one carried on under defendant's direction, then the removal was to be with her consent, and that the charges for caring for her there should take the place of the use of the house and furniture and the monthly allowance.

Defendant chose an institution which was not under his own direction and where she would be a paying inmate and be cared for, but the plaintiff refused to leave the house, and defendant ceased paying the monthly allowance, and plaintiff brought action for the arrears of the allowance and for the construction of the will:—

Held, that the will indicated that the condition of the plaintiff was one that needed care and oversight; that in 1901 the defendant came to the conclusion and made it known to her, that it would be for her welfare to give up housekeeping and take the benefit left to be brought into effect by his absolute judgment; that he had the right and authority to place her, as he had decided to do, in

a sufficiently adequate home, without her consent, and that the choice he had made was such a one, and he was entitled to possession of the house and to cease paying the monthly allowance. *Leduc v. Booth*, 68.

8. *Legacies—Overpayment to Legatees—Judgment—Mistake—Repayment—Interest—Administration—Distribution.]*

—A testator by his will gave to two trustees his estate real and personal and directed the trustees to pay: (1) to a sister a legacy of \$500, and in case of her death to her daughter, and in case of the death of the daughter to the daughter's children in equal shares; (2) to a niece a legacy of \$500; (3) to the children of another niece a legacy of \$500; and (4) to a charitable institution a legacy of \$500; with a direction that should there not be sufficient to pay all the legacies there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions:—"

Held, that the children of the niece, who were five in number, were entitled among them to one-fifth of the residue and not to one-ninth each.

Judgment of Moss, J.A., 3 O.L.R. 208, affirmed.

Proceedings were taken in the year 1882 for the administration of the estate, and without, as was held in the previous judgment of this Court, 27 A.R. 242, proper proceedings being taken whereby they might have been bound, the children of the niece were ignored and their legacy and their share in the residue were divided between the charitable institution, the trustees, and one of the other legatees:—

Held, that the trustees and the charitable institution were bound to repay the excess which they had received, with interest from the date of proceedings taken by the children of the niece.

Per MACLENNAN, J.A., dissenting:—Interest should be allowed from the date of distribution under the report in the administration proceedings.

Judgment of MOSS, J.A., 3 O.L.R. 208, reversed. *Uffner v. Lewis* (No. 2), *Boys' Home v. Lewis* (No. 2), 684.

9. *Legatee Predeceasing Testatrix—Right of Husband and Children of Deceased Legatee.*]—A testatrix by will made in 1901 directed her estate to be divided into four equal shares and one share to be paid to each of her four children. One of the latter predeceased her intestate, leaving a husband and two children:—

Held, that by virtue of sec. 36 of the Wills Act, R.S.O. 1897, ch. 128, the husband of the deceased child took one-third

of one-quarter share in the estate of the testatrix, his two children taking the rest. *In re Hannah Hunt*, 197.

See CHURCH — EXECUTORS AND ADMINISTRATORS.

WINDING-UP.

See COMPANY, 4.

WORDS.

“*Acquisition.*”]—See CHURCH.

“*Actual disbursements.*”]—See LIEN, 2.

“*All my children.*”]—See WILL, 2.

“*Arising in the course of the reference.*”]—See ARBITRATION AND AWARD, 2.

“*Candidate.*”]—See PARLIAMENTARY ELECTIONS, 2.

“*Conduct the trial.*”]—See INTOXICATING LIQUORS.

“*Distraction.*”]—See COSTS, 1.

“*First publication.*”]—See COPYRIGHT, 2.

“*Give to the clerk or leave for him at his residence or place of business.*”]—See PARLIAMENTARY ELECTIONS, 3.

“*In certain other cases.*”]—See CRIMINAL LAW, 6.

“*Legal heirs designated by will.*”]—See INSURANCE, 2.

“*Member of a school board for which rates are levied.*”]—See MUNICIPAL CORPORATIONS, 3, 4, 5.

“*Now.*”]—See WILL, 6.

"Ordinary expenditure."] —
See MUNICIPAL CORPORATIONS, 1.

"Then surviving."] — See
WILL, 5.

*"Two arbitrators, one to be
appointed by each party."*] —
See ARBITRATION AND AWARD, 3.

"Wilfully Voting."] — See
PENALTIES AND PENAL ACTIONS,
3.

**WORKMEN'S COMPENSATION
ACT.**

See MASTER AND SERVANT.

WRIT OF SUMMONS.

See CONTEMPT OF COURT —
PARTIES, 4—PRACTICE, 4.



